

# PAY TO PLAY? CAMPAIGN FINANCE AND THE INCENTIVE GAP IN THE SIXTH AMENDMENT'S RIGHT TO COUNSEL

NEEL U. SUKHATME & JAY JENKINS†

## ABSTRACT

*For nearly sixty years, the U.S. Supreme Court has affirmed that the Sixth Amendment to the U.S. Constitution guarantees felony defendants the right to counsel, regardless of their ability to pay. Yet nearly all criminal procedure scholars agree that indigent defense as practiced today falls far short of its initial promise. These scholars frequently cite a lack of political support, insufficient public funding, and a failure to address instances of inadequate legal representation, among other things, as causes for the underlying systemic dysfunction.*

*This Article contends that these conventional critiques are incomplete. Rather, indigent defense systems often fail due to poor design, as they do not align publicly funded defense attorneys with their clients' best interests. This is particularly true when courts appoint private attorneys to represent indigent defendants for a fee, as is done in hundreds of jurisdictions across the United States. These assignment systems create an "incentive gap" that financially motivates defense attorneys to maximize their caseloads but minimize their efforts.*

*The Article then shows how campaign finance exacerbates this problem. Specifically, we provide empirical evidence that elected trial court judges regularly appoint attorneys who donate to their campaigns*

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† Neel U. Sukhatme (J.D., Ph.D. Economics) is an Associate Professor at Georgetown University Law Center and an Affiliated Faculty Member at Georgetown University's McCourt School of Public Policy. Jay Jenkins (J.D.) is a Project Attorney with the Harris County, Texas Criminal Justice Coalition. The Authors thank the participants at the Georgetown Law Summer and Fall Faculty Workshops and the University of Texas Law and Economics Workshop; Jason Tashea and Keith Porcaro for connecting the Authors; the Texas Indigent Defense Commission; and Gregg Bloche, Alex Bunin, Jens Dammann, Hon. Richard A. Frye, David Hyman, Greg Klass, David Luban, Paul Ohm, David Schwartz, Mike Seidman, Gerry Spann, David Super, Josh Teitelbaum, and Abe Wickelgren for helpful comments. We are grateful to Kyle Rozema for kindly sharing Texas bar data, and Adam Liptak and *The New York Times* for publicizing our results. See Adam Liptak, *Campaign Funds for Judges Warp Criminal Justice, Study Finds*, N.Y. TIMES (Jun. 1, 2020). We especially thank Arturo Romero Yáñez for superb research assistance on this project. Any errors are the Authors' own.

*as counsel for indigent defendants—a system we call “judicial pay to play.” We find trial judges routinely accept such donations, often as apparent “entry fees” from attorneys who have just become eligible for appointments. These judges, in turn, typically award their donors more than double the cases they award to non-donors, with the average donor attorney earning greater than a twenty-seven-fold return on her donation. Indeed, we find indigent defense appointments can be surprisingly lucrative. Many donor attorneys earn tens or even hundreds of thousands of dollars across the hundreds of cases assigned to them by their donee judges.*

*Worse yet, this apparent quid pro quo between judges and defense attorneys may directly harm defendants. We find that defense attorneys who donate to a judge are, if anything, less successful than non-donor attorneys in attaining charge reductions, dismissals, and acquittals, or avoiding prison sentences. We contend donor attorneys might underperform simply because they take on so many more cases from their donee judges, and hence spend less time on each matter.*

*Our study is the first empirical analysis of how campaign finance distorts criminal trial court decisionmaking. Though our data is limited to Harris County (Houston), Texas—the nation’s third most populous county—we show that pay to play is probably endemic across that state. Indeed, similar problems likely affect millions of Americans, as trial judges who control indigent defense assignments in many other states—including California, Georgia, Maryland, Missouri, North Carolina, and Ohio, among others—accept attorney donations to fund their electoral campaigns. Unless substantial reforms are made to address the corrosive influence of campaign finance on criminal defense, the Sixth Amendment’s right to counsel will continue to ring hollow for millions of indigent defendants.*

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## INTRODUCTION

Were they alive today, Johnny Ray Johnson and Keith Steven Thurmond would be experts on what happens when indigent defendants are not assigned competent counsel. Both were inmates on death row in Texas.<sup>1</sup> In 2004, Johnson’s appointed attorney, Jerome Godinich, missed the deadline to file a petition for federal habeas corpus relief.<sup>2</sup> Godinich claimed a malfunctioning filing machine failed

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1. Lise Olsen, *Slow Paperwork in Death Row Cases Ends Final Appeals for 9*, HOUS. CHRON. (Mar. 21, 2009, 5:30 AM) [hereinafter Olsen, *Slow Paperwork*], <https://www.chron.com/news/houston-texas/article/Slow-paperwork-in-death-row-cases-ends-final-1736308.php> [<https://perma.cc/U3J3-HG6M>].

2. *Id.*; Mark Bennett, *An Embarrassment Even to Criminal Defense Lawyers*, BENNETT & BENNETT (Mar. 23, 2009), <https://blog.bennettandbennett.com/2009/03/an-embarrassment-even-to-criminal-defense-lawyers> [<https://perma.cc/73X8-V9HD>].

to date-stamp the petition, which he filed after the court had already closed on the deadline date.<sup>3</sup> His client eventually lost on appeal and was executed.<sup>4</sup> Months after the first missed deadline, Godinich missed the same deadline in Thurmond's case.<sup>5</sup> His excuse? The same malfunctioning filing machine.<sup>6</sup> The delay foreclosed a petition from Thurmond,<sup>7</sup> who was also eventually put to death.<sup>8</sup>

Sadly, cases like these are not rare. Although many indigent defense counsel perform admirably for their clients, others have fallen asleep during a client's capital murder trial,<sup>9</sup> or allowed their client to remain locked up in pretrial detention for seventeen months before investigating facts in a drug possession case in which no drugs were ever found.<sup>10</sup> There is, unfortunately, no shortage of such horror stories.

More prosaically, public defenders and assigned defense counsel often fail their clients simply because they are spread too thin across too many cases. Many of these attorneys handle hundreds of matters at the same time,<sup>11</sup> practically precluding them from conducting a focused investigation on any one case or providing truly individualized counsel to any one defendant. It is no surprise that the vast majority of indigent defendants simply do the most expeditious thing and quickly

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3. Bennett, *supra* note 2.

4. Olsen, *Slow Paperwork*, *supra* note 1.

5. *Id.*

6. *Id.*; Brief for Petitioner-Appellant at 12, Thurmond v. Quarterman, 341 F. App'x 40 (5th Cir. 2009) (No. 08-70008).

7. See Thurmond v. Thaler, No. 08-70008, 2011 U.S. App. LEXIS 1608, at \*6-8 (5th Cir. Jan. 25, 2011).

8. Nancy Flake, *Thurmond Dies for 2001 Double Murder*, HOUS. CHRON. (Mar. 12, 2012, 7:55 PM), <https://www.chron.com/neighborhood/magnolia/news/article/Thurmond-dies-for-2001-double-murder-9554317.php> [<https://perma.cc/8836-YN CZ>].

9. See Carol S. Steiker, Gideon at Fifty: *A Problem of Political Will*, 122 YALE L.J. 2694, 2696 (2013) (citing Henry Weinstein, *A Sleeping Lawyer and a Ticket to Death Row*, L.A. TIMES (July 15, 2000, 12:00 AM), <http://articles.latimes.com/2000/jul/15/news/mn-53250> [<https://perma.cc/NZ5J-PK9J>]). In another case, a prosecutor claimed in his opening statement that the state would prove the defendant's guilt in a rape and murder trial through bite mark evidence. *Id.* at 2695. The indigent defense counsel did not respond to the comment, "the functional equivalent of endorsing [the prosecutor's] opening statement." *Id.* The defendant was exonerated after sixteen years in prison. *Id.*

10. Lise Olsen, *Hundreds of Indigent Inmates Jailed for Months Pretrial*, HOUS. CHRON. (Oct. 3, 2009, 5:30 AM), <https://www.chron.com/news/houston-texas/article/Hundreds-of-indigent-inmates-jailed-for-months-1566415.php> [<https://perma.cc/NJ7J-J57W>].

11. See, e.g., Steiker, *supra* note 9, at 2696 ("In Miami-Dade County, Florida, the average felony caseload per lawyer has reached five hundred in recent years due to budget cuts.").

plead guilty to whatever deal they are offered—often after being encouraged to do so by their own lawyer.<sup>12</sup>

This dynamic has led many criminal procedure scholars and practicing attorneys to assail the state of indigent defense in America. To illustrate, the *Yale Law Journal* held a symposium in 2013<sup>13</sup> to commemorate the fiftieth anniversary of *Gideon v. Wainwright*,<sup>14</sup> the landmark Supreme Court decision that established a right to counsel under the Sixth Amendment to the U.S. Constitution for all state felony defendants.<sup>15</sup> The occasion, however, turned out to be more lamentation than celebration, as legal scholars and practitioners pointed out the persistent failures of indigent defense systems across the country again,<sup>16</sup> and again,<sup>17</sup> and again.<sup>18</sup>

Most of these critiques rely in some part on a standard narrative centering on money and power.<sup>19</sup> Critics recognize that while *Gideon*

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12. See Jeanette Hussemann & Jonah Siegel, *Pleading Guilty: Indigent Defendant Perceptions of the Plea Process*, 13 TENN. J.L. & POL'Y 459, 464–69 (2019).

13. *Yale Law Journal Symposium To Examine Impact and Legacy of Gideon v. Wainwright Case*, YALE L. SCH. (Mar. 6, 2013), <https://law.yale.edu/yls-today/news/yale-law-journal-symposium-examine-impact-and-legacy-gideon-v-wainwright-case> [<https://perma.cc/LXJ4-88VE>].

14. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

15. *Id.* at 342, 345. Indigent capital defendants have had the right to counsel since the Supreme Court's decision in *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

16. See, e.g., Roger A. Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316, 2318 (2013) (“[F]ifty years after *Gideon* was decided, there is near-universal acceptance of the notion that our system of indigent defense is broken.”); Pamela R. Metzger, *Fear of Adversariness: Using Gideon To Restrict Defendants’ Invocation of Adversary Procedures*, 122 YALE L.J. 2550, 2552 (2013) (“[T]he Supreme Court has used *Gideon* to decrease the protection of Sixth Amendment rights that constitute the core structures of the American adjudicatory process.”).

17. See generally Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150 (2013) (arguing that indigent defense systems are underfunded and allow inadequate representation). These critiques are not new. See, e.g., Victoria Nourse, *Gideon’s Muted Trumpet*, 58 MD. L. REV. 1417, 1417 (1999) (“Once the darling of the legal academy, criminal procedure has fallen into disrepute.”); see also *id.* at 1431 (“The importance of the lawyer . . . is not someone to try a case (most cases are never tried), but someone to stand with the individual citizen unaligned to the forces that laid him low and resist claims of the natural and inevitable superiority of government.”).

18. See generally Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236 (2013) (claiming *Gideon* may have actually exacerbated racial discrimination in criminal justice enforcement rather than mitigating it).

19. See, e.g., Bright & Sanneh, *supra* note 17, at 2156, 2160. By contrast, a few critiques cut much deeper. In particular, Professor Paul Butler argues *Gideon* itself was misguided and has led to more harm than good. He contends that by coating the trial process with a false veneer of objectivity and fairness, the right to counsel might actually obfuscate the system’s true goal of subjugating poor and Black people. See generally Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176 (2013) (“Arguably, *Gideon* has not improved the

mandated states to provide counsel for indigent defendants, this mandate was unfunded.<sup>20</sup> Political actors, in turn, lacked the will to provide the resources necessary to make a poor defendant's right to counsel more than a symbolic gesture.<sup>21</sup> Combined with a substantial increase in prosecutorial power,<sup>22</sup> as well as the Supreme Court's reticence to put substantial teeth into the requirement that appointed counsel actually be effective,<sup>23</sup> the manifest failures of indigent defense in America are hardly surprising.

Certainly, this narrative contains a good bit of truth. But, as we show here, it is incomplete. Funding alone will not solve the problem, particularly in the context of assigned counsel systems where courts pay private attorneys to represent poor defendants. Such systems, which are used in hundreds of jurisdictions across the country, are undoubtedly underfunded on the whole. But that does not mean they are not highly profitable for some. We show that many defense attorneys make tens or even hundreds of thousands of dollars in a given year across assignments from a single judge.

Moreover, these attorneys often continue to receive such assignments even after they have been revealed to be woefully incompetent. For example, in the years after Messrs. Johnson and Thurmond were executed, Jerome Godinich was appointed as counsel in state court for hundreds of other felony defendants, continuing to

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situated of accused persons, and may even have worsened their plight.”). As Butler notes, similar arguments have also been raised in other parts of the legal system. *Id.* at 2198–99; *see, e.g.*, Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 719 (1992) (arguing that *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Miranda v. Arizona*, 384 U.S. 436 (1966), “served to stabilize and legitimate the status quo by creating the illusion of closure and cohesion”); *see also* WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 2* (2011) (noting that accused persons have fared worse as rights have ostensibly expanded).

20. *See, e.g.*, Erwin Chemerinsky, *Lessons from Gideon*, 122 YALE L.J. 2676, 2680 (2013) (“The Court imposed an unfunded mandate on state governments without any enforcement mechanism, and the Court then undermined the one remedy available to the judiciary, the ability to find ineffective assistance of counsel.”).

21. *See, e.g.*, Steiker, *supra* note 9, at 2700 (“Moving from courtroom to classroom to boardroom has made clear to me that any thoroughgoing solution to our Sixth Amendment quandary is less a matter of law than one of political will.”).

22. *See generally* David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473 (2016) (addressing various theories why prosecutorial power has grown, concluding that prosecutors' roles as “mediating figures” in the criminal justice system play a central role in their increase in power).

23. *See infra* notes 70–74 and accompanying text (discussing *Strickland v. Washington*, 466 U.S. 668 (1984), and succeeding cases).

amass a record of inadequate representation during this time.<sup>24</sup> Judges could have appointed other lawyers to these cases. Why did they continue to appoint the same underperforming attorneys?

The proximate cause<sup>25</sup> may lie in campaign finance. Godinich was assigned the majority of his felony cases from one trial court judge, Jim Wallace. Godinich was also a significant donor to Judge Wallace. Between 2005 and 2014, Godinich donated on at least seven occasions a total of \$9,000 to Judge Wallace's electoral campaigns. Between 2004 and 2018, Judge Wallace appointed Godinich to at least 1,974 cases, including five capital cases. And since 2014, Godinich has earned at least \$872,642.50 from cases before Judge Wallace. Clearly, some indigent defense attorneys are not just scraping by.<sup>26</sup>

Though Godinich is an outlier, the nexus between campaign finance and indigent defense extends far beyond him. This Article exposes that hidden connection. In particular, we present empirical evidence of a practice we call "judicial pay to play," where defense attorneys donate to elected judges to obtain or maintain access to indigent defense cases.

The Article creates the first large-scale database linking trial court campaign contributions with multiple criminal court datasets. Specifically, our data comprise the universe of 290,633 felony cases from January 2005 through May 2018 where defense counsel was assigned and ascertainable in Harris County, the nation's third most

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24. See Casey Tolan, *She Watched Her Husband Get Sentenced to Death. Now She's Becoming a Lawyer To Save Him and Others.*, SPLINTER (Oct. 24, 2016, 12:07 PM), <https://splinternews.com/she-watched-her-husband-get-sentenced-to-death-now-she-1793863088> [<https://perma.cc/6ZCU-Y79A>] (reporting that Godinich and his second chair attorney did not meet with the defendant until just before trial, conducted almost no investigation, and further, "at times during jury deliberations, neither of Juan's lawyers were present while the judge and prosecutors responded to questions from the jury by themselves." When Godinich was confronted, he said, "I have another trial to take care of."); see also Stephen B. Bright, *Independence of Counsel: An Essential Requirement for Competent Counsel and a Working Adversary System*, 55 HOUS. L. REV. 853, 869–70 (2018) ("[Jerome Godinich] was assigned 406 felony cases at the trial level in 2017—more than twice the national standard of 150 felony cases—as well as 8 capital cases, and 7 felony appeals." (citations omitted)).

25. We say proximate cause because we recognize, as critical legal studies scholars have argued, that deeper societal problems might be common drivers of all of these phenomena. If indeed "prison is for the poor, and not the rich," Butler, *supra* note 19, at 2178, then the whole system of judicial campaign finance might be yet another system that was created to be indifferent or even hostile to the interests of the poor.

26. These numbers were obtained from our underlying combined dataset; for details on how it was created, see *infra* Part III.B. These data, which include information on campaign donations and assigned cases in Harris County, allow us to identify judge–attorney pairings like the Wallace–Godinich pairing described here.

populous county<sup>27</sup> and the home of the city of Houston. Although a few recent pieces of scholarship have looked at how campaign donations might influence elected state supreme court justices,<sup>28</sup> this Article is the first to explore how campaign finance might affect trial court decisionmaking and criminal case outcomes.

What we find is shocking. Trial judges routinely accept donations from defense attorneys who practice before them. Worse, judges often accept these donations as an apparent “entry fee” from counsel soon after they become eligible for indigent defense appointments. And while donor and non-donor attorneys appear similar in terms of their education and experience, on average, judges assign their donors more than double the number of cases they assign to non-donors. Such assignments are flatly inconsistent with the rotation or “wheel” assignment system established under Texas law.<sup>29</sup>

In addition, we find these preferential assignment patterns enable donors to earn on average more than double the total attorney’s fees of non-donors. And the total amount of these fees can be quite significant: the average donor earns \$31,081 in attorney’s fees from her donee judge.<sup>30</sup> Put another way, if pay to play exists, then our regression analysis suggests that the average defense attorney receives more than a twenty-seven-fold return on her campaign contributions.<sup>31</sup>

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27. *Infra* note 146 and accompanying text.

28. See Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 7 STATE POL. & POL’Y Q. 281, 281 (2007) (finding that “campaign contributions [were] indeed correlated with judges’ decisions” when “[l]ooking at cases decided in the Supreme Court of Georgia’s 2003 term”); Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decision*, 86 N.Y.U. L. REV. 69, 73 (2011) (finding elected state supreme court justices in partisan elections are more likely to rule in favor of business interests as donations from those interested parties increase); Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 625 (2009) (providing correlative data to suggest “state supreme court judges routinely adjust their rulings to attract votes and campaign money”).

29. See *infra* notes 98–100 and accompanying text.

30. See *infra* Table 3.

31. To clarify how extraordinary this return is: if someone had invested \$10,000 in a portfolio that replicated the S&P 500 in March 2009, the market low during the Great Recession, and sold in July 2019, when the market recently peaked, their portfolio would have grown to \$48,708.38—just less than a 5-fold increase. See PK, *S&P 500 Periodic Reinvestment Calculator (With Dividends)*, DON’T QUIT YOUR DAY JOB (last updated June 2020), <https://dqydj.com/sp-500-periodic-reinvestment-calculator-dividends> [<https://perma.cc/TH2F-YELG>]. Moreover, as explained later, these return estimates are, if anything, significantly underestimated, as we only have reliable attorney revenue data from 2014–2018 and not from earlier years. See *infra* notes 176, 191 and accompanying text.

More troubling, the apparent quid pro quo we observe might directly harm indigent defendants. We find that, if anything, defense attorneys who donate to judges are less successful than those who do not in terms of attaining charge reductions, dismissals, and acquittals, or avoiding prison sentences for their clients. These results are not driven solely by observable differences in assigned cases or defendant characteristics, or unobservable differences that remain fixed over time. We suggest that, similar to the conventional narrative on overworked public defenders, donor attorneys might underperform simply because they take on so many more cases from their donee judges, and hence have less time to spend on each matter.<sup>32</sup>

The Article also presents qualitative evidence, based on news reports and interviews with practicing attorneys in Texas, suggesting these phenomena are endemic across the state. Furthermore, we explain why these problems might exist throughout the country, as trial judges in many other states—including California, Georgia, Maryland, Missouri, North Carolina, and Ohio, among others—can also receive donations from attorneys and control assignments of indigent defense counsel.<sup>33</sup>

Some might view these results as yet another nail in the coffin of *Gideon*—as further proof that America’s grand experiment with indigent defense is a failure and that societal forces will ensure it continues to be a failure, absent sweeping social and political change. Perhaps this is true. But we argue, more modestly, that our research reveals the more immediate problem is one of misaligned incentives. In today’s system, no one’s interests are truly aligned with those of indigent defendants. Instead, assigned counsel are often financially incentivized to dispose of indigent defense cases as quickly as possible, with as little effort as possible—motives that better align with the interests of zealous prosecutors and docket-conscious judges than those of poor defendants.

We argue that this “incentive gap” is an underappreciated fault at the heart of the right to counsel. We further explain that while modest reforms to attorney assignment rules and campaign finance regulations might reduce pay to play, they are unlikely on their own to solve the problem or substantially improve the lot of poor defendants absent deeper structural changes altering attorney incentives.

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32. See *infra* Part III.D.4.

33. See *infra* notes 226–37 and accompanying text.

Part I provides a brief history of indigent defense in the United States, starting before *Gideon* and moving to present day. Part II then overviews the three main models of indigent defense in America: assigned counsel, contract, and public defender systems. It further explains how each of these systems creates attorney incentives at odds with those of indigent defendants. It also provides qualitative evidence on how campaign finance interacts with these assignment systems to further distort attorney incentives and widen the incentive gap.

Part III turns toward our empirical findings. After describing how the dataset was constructed, it provides summary statistics, regression specifications, and graphical evidence showing how pay to play likely influences indigent defense appointments in Harris County. Part IV briefly lays out some policy proposals seeking to eliminate pay to play. It further explains why such proposals are unlikely to be successful or to substantially improve the quality of indigent defense unless they are also accompanied by deeper structural reforms.

#### I. THE PROMISE AND FAILURE OF *GIDEON*: A BRIEF HISTORY OF THE RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT

The origins of the right to counsel in the United States began long before *Gideon* in 1963. Twelve of the original thirteen colonies declared some form of this right in early versions of their state constitutions, despite the English common law denying such a right existed.<sup>34</sup> The Supreme Court described this split from the common law in *Holden v. Hardy*,<sup>35</sup> decided at the turn of the twentieth century:

The earlier practice of the common law . . . so far as it deprived him of the assistance of counsel and compulsory process for the attendance of his witnesses . . . had not been changed in England. But to the credit of her American colonies, let it be said that so oppressive a doctrine had never obtained a foothold there.<sup>36</sup>

By the early twentieth century, “every state . . . had established the right to have the assistance of counsel similar to that found in the Sixth Amendment”<sup>37</sup> and required the appointment of counsel in

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34. See *Powell v. Alabama*, 287 U.S. 45, 61–65 (1932).

35. *Holden v. Hardy*, 169 U.S. 366 (1898).

36. *Id.* at 386.

37. *The Story of the Scottsboro Boys in Powell v. Alabama*, SIXTH AMEND. CTR., <https://sixthamendment.org/the-right-to-counsel/history-of-the-right-to-counsel/the-story-of-the-scottsboro-boys> [<https://perma.cc/GVL6-SRWM>]; see also U.S. CONST. amend. VI (“In all

capital cases.<sup>38</sup> Nonetheless, the scope of the right was inconsistent across states, with one scholar estimating that by the early 1930s, approximately half of all states had yet to extend the right to counsel to non-capital cases.<sup>39</sup>

The calculus began to shift with the Supreme Court's 1932 decision in *Powell v. Alabama*.<sup>40</sup> In *Powell*, the Court overturned the conviction of six young men charged with rape on the grounds that they had been denied access to counsel.<sup>41</sup> The *Powell* Court found that in capital cases, the Sixth Amendment right to counsel was a fundamental right encompassed by the Due Process Clause of the Fourteenth Amendment.<sup>42</sup>

This “fundamental fairness” test soon became a part of Sixth Amendment jurisprudence. The Court next applied it in the context of a federal criminal trial in 1938's *Johnson v. Zerbst*.<sup>43</sup> In *Johnson*, two men facing federal counterfeiting charges were denied access to counsel, ultimately being convicted and sentenced.<sup>44</sup> In overturning the convictions, the *Johnson* Court definitively established a right to counsel in all federal criminal proceedings.<sup>45</sup>

Still, the Court was not yet ready to extend the right to counsel to encompass state proceedings. In *Betts v. Brady*,<sup>46</sup> a defendant charged with a non-capital crime in Maryland challenged the state court's refusal to appoint him counsel.<sup>47</sup> Rather than require counsel be

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criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).

38. *The Story of the Scottsboro Boys in Powell v. Alabama*, *supra* note 37.

39. *Id.* (citing HUGH RICHARD WILLIAMS, *THE HISTORY OF THE RIGHT TO FREE COUNSEL IN AMERICA* 29 (2001)).

40. *Powell v. Alabama*, 287 U.S. 45, 45 (1932).

41. *Id.* at 65. An out-of-state lawyer, who had previously offered to help local counsel, refused an appointment to act as counsel for the defendants. *Id.* at 56. Subsequently, the trial judge appointed all the members of the local bar as counsel but neglected to name an individual lawyer to act in that capacity. *Id.*

42. *Id.* at 71.

43. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

44. *Id.* at 459–60. The district attorney in the case denied the defendants' request for counsel on the grounds that the state courts did not appoint counsel unless the defendant was charged with a capital crime. *Id.* at 460.

45. *Id.* at 467 (“Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty.”).

46. *Betts v. Brady*, 316 U.S. 455 (1942).

47. *Id.* at 456–58.

available for indigent defendants in all state criminal proceedings, the *Betts* Court pointed to the variety of access to counsel constitutional provisions and statutes as proof that “in the great majority of the States, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial.”<sup>48</sup> The Court then enumerated a “special circumstances” test as to whether a state had violated a defendant’s due process rights by denying them access to counsel.<sup>49</sup>

Many state supreme courts and legislatures responded to *Betts* by affirming their support for the right to counsel, and by the late 1950s, thirty-five states required counsel be appointed in non-capital cases to at least some degree.<sup>50</sup> This affirmation of the right to counsel belied the *Betts* Court’s holding that the right was not considered fundamental.

Indeed, the Court revisited that issue just over twenty years later in *Gideon*.<sup>51</sup> There, as in *Betts*, the defendant faced felony charges in state court, this time in Florida.<sup>52</sup> Like in *Betts*, the trial court denied the defendant’s request to provide an attorney when the defendant was unable to hire his own.<sup>53</sup> Reversing their decision in *Betts*, the *Gideon* Court unanimously found that the right to counsel was essential to a

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48. *Id.* at 471.

49. *See id.* at 463–64 (“[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him . . . .”); *see also* Abe Krash, *The Architects of the Gideon Decision: Abe Fortas and Justice Hugo Black*, 92 TEX. L. REV. 1191, 1195 (2014) (explaining that *Betts* held “that in a state criminal prosecution of an indigent defendant that did not involve the death sentence, the constitutional right to the assistance of a lawyer depended on whether there were special circumstances in the case such that, without counsel, the defendant’s conviction would be regarded as fundamentally unfair” (citing *Betts*, 316 U.S. at 462, 473)).

50. *The Post-Betts Era in the States’ Courts*, SIXTH AMEND. CTR., <https://sixthamendment.org/the-right-to-counsel/history-of-the-right-to-counsel/the-post-betts-era> [<https://perma.cc/LBS9-37NZ>]. Moreover, special circumstances were found in almost every case, making the test a mere formality to obtain appointed counsel. *See* Stacey L. Reed, *A Look Back at Gideon v. Wainwright After Forty Years: An Examination of the Illusory Sixth Amendment Right to Assistance of Counsel*, 52 DRAKE L. REV. 47, 51 (2003) (citing WAYNE R. LAFAYE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 11.1 (3d ed. 2000)).

51. *See Gideon v. Wainwright*, 372 U.S. 335, 338 (1963). The Court noted in its decision that 22 states, as amici, argued that *Betts* was “an anachronism when handed down,” and should be overruled. *Id.* at 345 (internal quotations omitted).

52. *Id.* at 336–37.

53. *Id.* at 337.

fair trial in state criminal proceedings, remarking that “reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”<sup>54</sup>

Writing for the Court, Justice Hugo Black framed the issue in terms of resources and incentives for all parties involved. Noting that government actions and the behavior of wealthy defendants rendered access to counsel essential for a fair trial, he stated:

That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.<sup>55</sup>

Justice Black concluded that the ideals of American government necessitated the appointment of counsel to indigent defendants in state courts, noting that “[f]rom the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials.”<sup>56</sup> He further stated that this “noble ideal cannot be realized” if an indigent defendant has to face trial without a lawyer’s assistance.<sup>57</sup>

*Gideon* was warmly received by the public,<sup>58</sup> inspiring the award-winning book *Gideon’s Trumpet*.<sup>59</sup> And in subsequent years, the Court continued to expand the situations in which the right to counsel was deemed necessary, holding that it attaches from the time of indictment<sup>60</sup> to the time of a defendant’s first appeal.<sup>61</sup> The Court

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54. *Id.* at 344.

55. *Id.*

56. *Id.*

57. *Id.*

58. Reed, *supra* note 50, at 51 (citing LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 379 (2000)).

59. *Id.* at 51–52. See generally ANTHONY LEWIS, *GIDEON’S TRUMPET* (1964) (retelling the story of *Gideon v. Wainwright*).

60. See *Massiah v. United States*, 377 U.S. 201, 205–06 (1964); see also *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 211–12 (2008) (stating the right to counsel was triggered at criminal defendant’s initial appearance before a magistrate judge).

61. See *Douglas v. California*, 372 U.S. 353, 357–58 (1963) (a companion case to *Gideon*); see also *Halbert v. Michigan*, 545 U.S. 605, 616–24 (2005) (holding that a state may not deny an attorney to a defendant who seeks to appeal after entering a guilty plea); *Griffin v. Illinois*, 351

subsequently extended the right to probation revocation hearings<sup>62</sup> and juvenile delinquency proceedings.<sup>63</sup> Additionally, nearly a decade after *Gideon*, the Court ruled that the right to counsel applies in any criminal case resulting in actual imprisonment,<sup>64</sup> putting to rest many questions about *Gideon*'s scope.

Yet, even the most ardent supporters of *Gideon* acknowledged that significant resources would need to be marshalled to ensure the right to counsel was actually robust in practice. In his famous 1965 law review article, Professor Henry Monaghan forewarned the coming tension between *Gideon*'s promise and the practical and logistical problems that might arise: "Gideon's little regiment had no real difficulty in running up its colors, but it is quite apparent that an army — a very large one — must be raised if the victory is to be a lasting one."<sup>65</sup>

By the time *Gideon*'s *Trumpet* was turned into a popular television movie starring actor Henry Fonda in 1980,<sup>66</sup> the shortcomings of that decision had become painfully apparent. Many states had failed to take the steps needed to effectively comply with the ruling. These failures continue today, with many scholars attributing the continued crisis in access to counsel to weaknesses and oversights in *Gideon* itself.

In particular, a key limitation of *Gideon* was that it did not define, let alone mandate, the system by which assigned counsel would be

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U.S. 12, 18–20 (1956) (noting that due process and equal protection require states to pay for an indigent defendant's trial transcript if necessary for the defendant's appeal to be heard).

62. See *Mempa v. Rhay*, 389 U.S. 128, 137 (1967). More recently, the Court has held that ineffective assistance of counsel claims can be made based on the plea-bargaining process. See *Missouri v. Frye*, 566 U.S. 134, 148 (2012) (holding that defense attorneys have a duty to convey plea bargain offers to defendants); *Lafler v. Cooper*, 566 U.S. 156, 163–64 (2012) (finding that the prosecutor might be required to reoffer a plea if the defendant originally rejected it due to ineffective assistance of counsel).

63. *In re Gault*, 387 U.S. 1, 36 (1967) (holding that assistance of counsel is necessary for juveniles to navigate legal proceedings).

64. See *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972); see also *Alabama v. Shelton*, 535 U.S. 654, 654 (2002) (holding that a suspended prison sentence may not be imposed if the defendant lacked an attorney at trial); *Scott v. Illinois*, 440 U.S. 367, 373 (1979) (clarifying that the right to counsel is required whenever a defendant was actually sentenced to prison, but not if a prison sentence was merely authorized under the charging statute); Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161, 1164 (2019) ("During this decade, which saw larger criminal procedure reforms, the Court had the most generous approach toward indigent defense.").

65. Henry P. Monaghan, *Gideon's Army: Student Soldiers*, 45 B.U. L. REV. 445, 446 (1965).

66. *GIDEON'S TRUMPET* (Worldvision Enterprises 1980).

assigned or the requisite quality of such counsel.<sup>67</sup> Nor did it define what states must do to ensure this type of counsel is available for indigent defendants.<sup>68</sup> Put differently, *Gideon* gave states considerable freedom to shirk the large unfunded mandate the case had created.<sup>69</sup>

These issues were exacerbated by subsequent Court decisions, perhaps most notably by *Strickland v. Washington*.<sup>70</sup> There, the Court determined that claims of ineffective assistance of counsel can succeed only if there were an initial determination that a defense attorney's performance was so lacking "that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."<sup>71</sup> Moreover, the defendant must show the ineffectiveness prejudiced him so severely that there is a reasonable possibility that the outcome of the defendant's case would have been different without the deficient performance of counsel.<sup>72</sup>

Justice Thurgood Marshall noted in his *Strickland* dissent that this exacting standard would be hard to meet, since "it is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent."<sup>73</sup> And he was right. Though defendants regularly make ineffective assistance of counsel claims, they rarely succeed.<sup>74</sup>

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67. Cf. Bright & Sanneh, *supra* note 17, at 2160 ("Fifty years after *Gideon*, the right to counsel and equal justice are as much a fiction as the adversary system. The kind of justice people receive depends very much on the amount of money they have.").

68. See *id.* at 2154 ("The Supreme Court has refused to require competent representation, instead adopting a standard of 'effective counsel' that hides and perpetuates deficient representation.").

69. *Id.* at 2153 ("[M]ost states, counties, and municipalities—responsible for over ninety-five percent of all criminal prosecutions—have refused to provide funding necessary for counsel and equal justice, despite repeated reports of deficient representation and gross miscarriages of justice.").

70. *Strickland v. Washington*, 466 U.S. 668 (1984).

71. *Id.* at 687.

72. *Id.*

73. *Id.* at 710 (Marshall, J., dissenting).

74. A 2013 analysis found that the Supreme Court has virtually never found ineffective assistance of counsel since *Strickland*. See Chemerinsky, *supra* note 20, at 2689. Professor Erwin Chemerinsky identified just two Supreme Court findings of ineffective assistance of counsel at trial in the twenty-five years following *Gideon*—*Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005), both capital cases. Chemerinsky, *supra* note 20, at 2689. He also noted that the findings in *Wiggins* and *Rompilla* were called into question by the Court's ruling in *Cullen v. Pinholster*, 563 U.S. 170 (2011), which held that evidence of ineffective assistance of counsel could not be presented at federal habeas proceedings. *Id.* at 181–85; Chemerinsky, *supra* note 20, at 2689–90; see also *Padilla v. Kentucky*, 559 U.S. 356, 356 (2010) (holding that criminal defense attorneys must inform non-citizen defendants of the potential deportation consequences of guilty pleas).

The end result is that indigent defendants might get stuck with counsel who are not constitutionally ineffective, but whom paying clients would never select.<sup>75</sup>

With ineffective assistance claims largely rendered futile, some sought to remedy the dramatic underfunding of indigent defense through systemic, structural litigation.<sup>76</sup> But the potential for such federal litigation was limited, as federal courts relied on the abstention doctrine to avoid intervening in ongoing state cases.<sup>77</sup> Structural litigation in state courts was similarly unsuccessful, with courts demanding a showing of prejudice or the existence of a conflict on an individual case-by-case basis from public defenders seeking to remedy funding disparities.<sup>78</sup> The heightened evidentiary requirements have limited the number of structural indigent defense litigation suits in state courts, with one scholar stating, “It is estimated that no more than ten of these suits were filed between 1980 and 2000.”<sup>79</sup>

*Gideon*’s failures are also often attributed to underlying power dynamics and political considerations that adversely affect indigent defendants.<sup>80</sup> In particular, scholars point to asymmetries in monetary support and available resources for prosecutors and indigent defense counsel.<sup>81</sup> Prosecutors work closely with law enforcement agencies, whose job is to investigate in support of prosecution; defense counsel are instead left to fend for themselves should they desire to investigate

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75. As one private criminal defense firm in Texas colorfully (and perhaps self-servingly) noted on its website, “If you’re appointed a lawyer in a criminal case in Texas, your court-appointed lawyer may be an incompetent hack, or he may be a truly outstanding attorney . . . [P]eople are almost always happier when they have counsel of their choice than when they have counsel thrust upon them.” See *Court-Appointed Lawyers*, BENNETT & BENNETT (June 16, 2019, 2:56 PM), <https://bennettandbennett.com/about/court-appointed-lawyers> [<https://perma.cc/ZZF9-ED7Y>].

76. Cf. Chemerinsky, *supra* note 20, at 2687 (“There have been many challenges to the inadequacy of the system of providing criminal representation within a jurisdiction.”).

77. *Id.*; see also *Younger v. Harris*, 401 U.S. 37, 43–54 (1971) (discussing why federal courts abstain from issuing rulings that interfere with ongoing state criminal prosecutions); Margaret A. Costello, *Fulfilling the Unfulfilled Promise of Gideon: Litigation as a Viable Strategic Tool*, 99 IOWA L. REV. 1951, 1962 (2014); Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 438–43 (2009).

78. See Chemerinsky, *supra* note 20, at 2687 (citing *Florida v. Pub. Def.*, 12 So. 3d 798 (Fla. Dist. Ct. App. 2009)).

79. See Drinan, *supra* note 77, at 431.

80. See, e.g., Bright & Sanneh, *supra* note 17, at 2156 (“Prosecutors have vast resources and immense power in conducting their inquests and dictating outcomes in the plea bargaining that resolves the overwhelming majority of cases.”); *id.* at 2160 (“Prosecutors evaluate cases not as objective inquisitors, but as adversaries and politicians.”).

81. See *id.* at 2156–57.

on behalf of their clients.<sup>82</sup> Prosecutors are afforded large budgets dedicated to investigation; indigent defense attorneys are rarely (if ever) granted such a luxury.<sup>83</sup> And some judges rely heavily—perhaps inappropriately—on prosecutors, following their recommendations and even asking prosecutors to write orders for them,<sup>84</sup> a benefit rarely accorded to counsel advocating on behalf of indigent defendants.

The politics of mass incarceration in the decades following *Gideon* have further entrenched the built-in advantages that prosecutors enjoy over defense counsel. Though America's criminal justice system only moderately increased in size in the 1960s and 1970s, the tough-on-crime 1980s and 1990s created a system with a higher incarceration rate than any other industrialized nation.<sup>85</sup> The demand for indigent defense likewise exploded,<sup>86</sup> financially straining a system that was already starved for resources.

The political battle for indigent defense resources, pitting popular tough-on-crime policies against poor people accused of crimes, was unsurprisingly one-sided. According to one scholar discussing capital defendants: “The individuals adversely affected by this crisis—those accused of aggravated murder—are the most hated and least politically powerful in the country, and political actors, including judges, are not highly motivated to make unpopular decisions that would benefit them.”<sup>87</sup> With political considerations weighing heaviest on publicly elected prosecutors and judges, there was little to gain professionally from insisting on a level playing field.<sup>88</sup>

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82. *Id.* at 2156. Moreover, discovery is limited in criminal cases, so defendants are also limited in terms of what information they can obtain from prosecutors and what prosecutors are obligated to disclose to defendants. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963).

83. Bright & Sanneh, *supra* note 17, at 2156.

84. *Id.*

85. *See* Chemerinsky, *supra* note 20, at 2686 (citing MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012)).

86. Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 *LAW & CONTEMP. PROBS.* 31, 31 (1995).

87. Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 *BUFF. L. REV.* 329, 459 (1995).

88. *See* Bright & Sanneh, *supra* note 17, at 2160 (noting many prosecutors are elected on tough-on-crime platforms); *id.* at 2171 (stating state court judges are often elected). Some scholarly critiques of *Gideon* also focus on its impact on other criminal procedural rights. *See* Justin F. Marceau, *Gideon's Shadow*, 122 *YALE L.J.* 2482, 2484 (2013) (arguing *Gideon* has been used as a cudgel to curb other procedural rights); Metzger, *supra* note 16, at 2552–59 (demonstrating how *Gideon* and *Strickland* have weakened the adversarial process). Others have focused on *Gideon*'s failure to adequately protect Black defendants. *See, e.g.,* Chin, *supra* note 18, at 2236 (arguing the *Gideon* Court failed to directly address racial discrimination, and this

## II. THE INCENTIVE GAP IN THE RIGHT TO COUNSEL

The long history of the right to counsel is largely defined by false hopes and unmet expectations. And, as is commonly argued, inadequate funding, tepid political support, and the practical inability of defendants to succeed on most ineffective assistance of counsel claims are important reasons why indigent defense has not evolved the way many advocates hoped it would after *Gideon*.

But indigent defense in America does not just suffer from a lack of money or a lack of political support—it also suffers from poor design.<sup>89</sup> Indeed, most indigent defense systems are built on shaky foundations that put publicly funded defense attorneys at odds with those they represent. This incentive gap, in turn, adversely affects the legal representation these defendants receive.<sup>90</sup>

This Part explores this dynamic. It begins by summarizing the different models of indigent defense adopted by various jurisdictions and then discusses how they distort attorney incentives in different ways. It also explains how the relationship between judges and defense attorneys—mediated through the mechanism of campaign finance—exacerbates the incentive gap, thereby further adversely impacting the provision of indigent defense.

### A. *Background on Indigent Defense Systems*

*Gideon* and its progeny famously failed to direct states on how to provide counsel to poor defendants, thereby giving them substantial latitude in crafting indigent defense systems. States are fairly evenly

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failure portended larger failures to protect the rights of African Americans subject to the Jim Crow system of criminal justice). Still others suggest *Gideon* might actually be counterproductive to the plight of the poor in the justice system. See Butler, *supra* note 19, at 2178 (“Poor people lose, most of the time, because in American criminal justice, poor people are losers. Prison is designed for them. This is the real crisis of indigent defense. *Gideon* obscures this reality, and in this sense stands in the way of the political mobilization . . . .”); see also John H. Blume & Sheri Lynn Johnson, *Gideon Exceptionalism?*, 122 YALE L.J. 2126, 2129 (2013) (attempting to reconcile the state of indigent defense in America with the general reverence for *Gideon* by declaring it to be “both a ‘shining city on a hill’ . . . [and] a sham”).

89. Of course, these phenomena might be interrelated—for example, some poor design choices in indigent defense systems might be deliberately made by those looking to render the system impotent. And a lack of funding is one way to make sure that poor design leads to worse outcomes.

90. A rare article that examines how assigned counsel incentives are affected by payment systems is Benjamin Schwall, *More Bang for Your Buck: How To Improve the Incentive Structure for Indigent Defense Counsel*, 14 OHIO ST. J. CRIM. L. 553 (2017).

split between administering indigent defense at the local (usually county) level or at the state level.<sup>91</sup>

Jurisdictions also are split among three different models of representation: assigned counsel, contract, and public defender.<sup>92</sup> Each of these models is commonly used in the United States. Public defender systems are utilized most often in larger cities, whereas assigned counsel systems are used in more jurisdictions overall, particularly in rural parts of the country.<sup>93</sup> Each of these systems is described below.

1. *Assigned Counsel.* Assigned counsel systems rely on private attorneys to represent indigent defendants.<sup>94</sup> The oldest model is an ad hoc assigned counsel system,<sup>95</sup> where “appointment of counsel is generally made by the court, without benefit of a formal list or rotation method and without specific qualification criteria for attorneys.”<sup>96</sup> Popular in smaller, more rural jurisdictions, ad hoc assigned counsel systems are “frequently criticized for fostering patronage and lacking control over the experience level and qualifications of the appointed attorneys.”<sup>97</sup>

Other iterations of assigned counsel systems address some, but not all, of the ad hoc model’s shortcomings. One such system is sometimes referred to as the wheel system, in which “private attorneys, acting as independent contractors and compensated with public funds, are individually appointed from a public appointment list of qualified attorneys using a system of rotation to provide legal representation and services to a particular indigent defendant accused of a crime or juvenile offense.”<sup>98</sup> Wheel and ad hoc assigned counsel systems

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91. See SUZANNE M. STRONG, STATE-ADMINISTERED INDIGENT DEFENSE SYSTEMS, 2013, at 1 (2017), <https://www.bjs.gov/content/pub/pdf/saids13.pdf> [<https://perma.cc/BYU8-28DL>] (“In 2013, 28 states and the District of Columbia had state-administered indigent defense programs for the delivery of criminal defense services.”).

92. Spangenberg & Beeman, *supra* note 86, at 32.

93. CAROLINE WOLF HARLOW, U.S. DEP’T OF JUST. OFF. OF JUST. PROGRAMS, DEFENSE COUNSEL IN CRIMINAL CASES 4–5 & tbls. 5–6 (2000), <https://www.bjs.gov/content/pub/pdf/dccc.pdf> [<https://perma.cc/7PAM-L35H>].

94. Spangenberg & Beeman, *supra* note 86, at 32.

95. *Id.* at 33.

96. *Id.*

97. *Id.*

98. TEX. INDIGENT DEF. COMM’N, PRIMER ON MANAGED ASSIGNED COUNSEL PROGRAMS 3 (2017) [hereinafter TEX. INDIGENT DEF. COMM’N, PRIMER], <http://www.tidc.texas.gov/media/8d87ba4edab9eb1/managed-assigned-counsel-primer.pdf> [<https://perma.cc/J9GV-2W96>]. As discussed in more detail below, Harris County, where we conducted our empirical analysis, is supposed to be a wheel jurisdiction. See TONY FABELO, CARL REYNOLDS & JESSICA TYLER,

generally require attorneys to petition the court for any case-related expenses, including funds for investigation, expert witnesses, and other litigation costs.<sup>99</sup> These expenses often require prior approval from the court and are limited by a maximum, court-determined payout.<sup>100</sup>

The last distinct form of an assigned counsel system is known as a managed or coordinated assigned counsel program. Rather than let the judge select an indigent defense attorney, this decision is left to an independent body such as “[a] governmental entity, nonprofit corporation, or bar association operating under a written agreement with a county for the purpose of appointing counsel to indigent defendants.”<sup>101</sup> These are the rarest assigned counsel systems,<sup>102</sup> perhaps due to the additional administrative burdens that accompany them.

2. *Contract Attorneys.* Contract programs differ from assigned counsel systems in that the jurisdiction “enters into contracts with private attorneys, law firms, bar associations, or non-profit organizations to provide representation to indigent defendants.”<sup>103</sup> Still, in practice, many modern contract systems operate like assigned counsel systems, the most significant difference being that there is no rotation requirement among attorneys in a contract system.<sup>104</sup>

An early model of contract attorney systems is the fixed-price contract model, where “the contracting lawyer, law firm, or bar association agrees to accept an undetermined number of cases within an agreed upon contract period . . . for a single flat fee.”<sup>105</sup> In a fixed-price contract model, the contracting entities are responsible for the cost of investigation and expert witnesses in all cases, even if the caseload in the jurisdiction is higher than expected for the term of the contract.<sup>106</sup> Fixed-price contract models are frequently faulted for their

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IMPROVING INDIGENT DEFENSE: EVALUATION OF THE HARRIS COUNTY PUBLIC DEFENDER 12 (2013) [hereinafter FABELO ET AL., IMPROVING INDIGENT DEFENSE], <http://harriscountypublicdefender.org/wp-content/uploads/2013/10/JCHCPDFinalReport.pdf> [<https://perma.cc/RS7U-JGBJ>] (“Harris County relies primarily on appointments from the ‘wheel’ of eligible attorneys to provide counsel for indigents, in an ‘assigned counsel’ system.”).

99. Spangenberg & Beeman, *supra* note 86, at 33.

100. *Id.*

101. TEX. INDIGENT DEF. COMM’N, PRIMER, *supra* note 98, at 3.

102. Spangenberg & Beeman, *supra* note 86, at 33.

103. *Id.* at 34.

104. *See* TEX. INDIGENT DEF. COMM’N, PRIMER, *supra* note 98, at 4.

105. Spangenberg & Beeman, *supra* note 86, at 34.

106. *Id.*

failure to take into account the time that the attorney is expected to spend representing indigent clients, the competency of the attorney, the complexity of the case, or the lack of support costs provided to the attorney.<sup>107</sup>

Another older model of contract attorney program is known as the fixed-fee-per-case contract model, in which lawyers are paid by the case rather than contracting to provide an unlimited number of cases for a flat fee.<sup>108</sup> In this model, funds for investigation, expert witnesses, and support services are all included in the contract.<sup>109</sup> Just as with the fixed price model, many criticize the fixed-fee-per-case model for its lack of quality control.<sup>110</sup> Nonetheless, jurisdictions often overlook the shaky legal and ethical footings of a contract attorney system to reap the benefit of projecting costs by limiting the amount of money apportioned in each contract.<sup>111</sup>

3. *Public Defenders.* Finally, public defender systems are probably the best-known model of indigent defense provision. Such systems employ staff attorneys who are paid a fixed salary to provide representation to poor defendants.<sup>112</sup> More precisely, a public defender system is often defined as “a governmental entity or nonprofit corporation that: 1) operates under written agreement with a county rather than an individual judge or court; 2) uses public funds; and 3) provides legal representation and services to indigent defendants accused of a crime or juvenile offense.”<sup>113</sup>

The first public defender program started in Los Angeles in 1913, but the model did not gain widespread popularity until national studies published in the 1970s supported this approach.<sup>114</sup> Unfortunately, the increased demand for indigent defense services beginning in the 1980s means that many public defenders now carry overwhelmingly large caseloads, often resulting in ineffective representation.<sup>115</sup>

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107. *Id.* (citing *State v. Smith*, 681 P.2d 1374 (Ariz. 1984)). In *State v. Smith*, the Arizona Supreme Court found that the fixed-price contract models used in several Arizona counties were unconstitutional. 681 P.2d at 1381.

108. Spangenberg & Beeman, *supra* note 86, at 34.

109. *See id.*

110. *See id.* at 35.

111. *See id.*

112. *Id.* at 36.

113. TEX. INDIGENT DEF. COMM'N, PRIMER, *supra* note 98, at 3.

114. Spangenberg & Beeman, *supra* note 86, at 36.

115. *Id.* at 36–37.

Some jurisdictions use public defenders alongside assigned counsel or contract attorneys.<sup>116</sup> This might be, for example, because there are insufficient numbers of public defenders who are able to handle the flow of indigent defense cases. In some instances, public defenders handle only a small fraction of such cases. As discussed in more detail below, Harris County, Texas, is one such jurisdiction.<sup>117</sup>

*B. Different Systems, Different Incentives*

Apart from being poor, typically young, and male, indigent defendants differ from one another in terms of their race, background, criminal history, employment and family status, and risk preference, as well as the crimes for which they are charged. Still, most defendants, whether poor or not, invariably share some predictable goals. Clearly, most would like to avoid a criminal conviction and punishment. Failing that, most want to minimize any punishment they receive, whether in terms of prison, probation, or fines. And like most people, indigent defendants would like to avoid pretrial detention regardless of the outcome.

Defense attorneys who represent indigent defendants also share some predictable goals. Some of those goals might align with those of their clients—for example, a desire to win a case or to vindicate the rights of the innocent who are wrongfully accused of a crime. Other goals, however, might not be so compatible. This, in turn, might open up an incentive gap that causes attorneys to behave in ways that are detrimental to their clients.

This incentive gap is shaped by the particular indigent defense system in which attorneys operate.<sup>118</sup> As such, how this system is designed might affect, among other things: how many cases attorneys choose to take on; how much time and resources attorneys spend on each case they are assigned; when and whether an attorney recommends settling a case to a client and on what terms; and the quality of lawyer who chooses to participate in such a system in the first

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116. See, e.g., James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 161 (2012) (discussing that one in five murder defendants in Philadelphia were randomly assigned a public defender and the rest received assigned counsel).

117. *Infra* Part III.A.2.

118. See Schwall, *supra* note 90, at 553 (recognizing that “[t]he payment system and related incentive structure can have a major effect on an attorney’s behavior, and this impact is somewhat predictable”).

place. We explore these issues in more detail below, examining how these incentives operate within each model of indigent defense.

1. *Caseload Incentives for Assigned Counsel and Contract Attorneys.* First, and perhaps most importantly, the design of an indigent defense system can affect attorneys' incentives when it comes to the size of their caseloads. In all assigned counsel and many contract attorney systems, payments to an attorney typically bear some relation to the number of cases the attorney is assigned. The payment might be a flat fee for each case that is assigned, a flat fee for each court appearance or day worked, or an hourly fee for time worked on a case.<sup>119</sup> Such systems often include caps on the maximum amount an attorney can be paid on a particular matter.<sup>120</sup>

Consider first a jurisdiction in which an attorney is paid a flat fee for each case she is assigned, as is done in some assigned counsel and contract attorney systems.<sup>121</sup> If the flat fee is too low to justify taking a case—for example, if the attorney has more profitable ways to spend her time—then the attorney will choose not to take the case. But if the flat fee is large enough, the attorney will be incentivized to take on a large number of cases, since each case adds revenue without significantly increasing costs.<sup>122</sup> By contrast, working more intensely on any one particular case gives the attorney no additional revenue, since compensation is fixed regardless of the effort expended or outcome achieved. Thus, paying attorneys a flat fee per case might push them toward large caseloads for which they exert little effort on any one case. In addition, these attorneys might settle cases quickly, since additional time spent on a case is just wasted from a financial perspective.

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119. See Spangenberg & Beeman, *supra* note 86, at 33 (explaining that in the ad hoc assigned counsel program, attorneys are usually paid on an hourly basis, and in some states, attorneys are provided a flat fee per case); *id.* at 34 (discussing fixed-fee-per-case contracts).

120. See JANET RENO, DANIEL MARCUS, MARY LOU LEARY & NANCY E. GIST, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 4 (2000), <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf> [<https://perma.cc/D3H6-2C58>].

121. In this example, and the others that follow, assume that the underlying cases are otherwise identical and that an attorney is motivated largely, if not exclusively, by financial gain. That is, the attorney seeks to maximize the total revenue she earns net of costs across all indigent defense cases she takes on. Attorneys in the real world are, of course, not so one-dimensional; nonetheless, our empirical analysis suggests attorneys do respond to financial incentives, indicating the profit motive is an important determinant of attorney behavior.

122. This assumes the cost of working on a case goes up linearly as well; if costs increase in a non-linear manner, then the attorney will eventually reach a point where adding an additional case will be more costly than the revenue she earns from it. The general point still holds, however, that the attorney will have an incentive to take on more cases until she reaches that point.

Note the paradox that emerges here. On the surface, it might seem that the large number of cases assigned to these attorneys is the primary reason why they are unable to spend much time or exert much effort on any one case. But the real reason these attorneys are overextended is that they have *chosen* to accept an overload of cases in the first place. In this setting, it is not the lack of funds but the poor design of the indigent defense system itself that is driving the dysfunction.

Although the per-case payment scheme might be an obvious example of how a large incentive gap might open up between attorney and client, other payment schemes distort incentives in less obvious ways. For example, consider when attorneys are paid based on the number of days they spend on a case. This is how assigned counsel in Harris County are paid,<sup>123</sup> as demonstrated in a fee table for an actual case, shown in Appendix Figure A.1. There, we can see the attorney was paid \$125 a day for each court appearance, regardless of how long he actually spent in court on the case itself, or how many other cases he might have handled on those same days. Those five court appearances entitled the attorney to a total of \$625 in attorney's fees.

At first glance, a pay-per-day system might seem to benefit clients, since an attorney has an incentive to spend many days on each case, thereby increasing total wages. But this is likely incorrect for at least two reasons.

First, like the system where attorneys are paid by the case, attorneys under this system still earn more money if they maximize the number of cases they take on. This once again leads to concerns about defense attorneys choosing to accept an excessive workload.

Second, a daily payment system encourages attorneys to "touch" as many case files as possible in a single day to ensure they are eligible to be paid for that day. But the amount of work they spent on each case might be minimal. The optimal strategy for an attorney seeking to maximize revenues and to minimize effort is to do barely any work on a case on any given day, but to spread this minimal work out over many days. Again, this does not work to the benefit of indigent defendants.

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123. See HARRIS COUNTY DISTRICT COURTS TRYING CRIMINAL CASES FAIR DEFENSE ACT ALTERNATIVE PLAN FOR APPOINTMENT OF COUNSEL TO INDIGENT DEFENDANTS: FEE SCHEDULE 2-3 (last updated Mar. 2019), <http://tidc.tamu.edu/IDPlanDocuments/Harris/Harris%20District%20Court%20Attorney%20Fee%20Schedule.pdf> [<https://perma.cc/DQ86-B5HJ>] (explaining that for non-capital, post-conviction proceedings, or argument in the court of criminal appeals, all district courts pay per court appearance or per court appearance plus out-of-court hours with presumptive maximums).

In fact, it could even be detrimental to a defendant who is incarcerated while awaiting trial. Not only does the attorney have little incentive to spend quality time on a defendant's case, but now she has an incentive to drag the case out while her client languishes in jail.

An hourly payment system seems preferable to these two alternatives. In an hourly system, an attorney is paid based on the amount of time she spends on a case. At first glance, there is no incentive to take on more cases—an attorney can spend more time on the same case and earn the same marginal revenue as she would by taking on a new one.<sup>124</sup> It might even be better for an attorney to work more on an existing case, since there are fixed costs in picking up a new matter that might make it more onerous than working an additional hour on a case with which she is already familiar.

However, in practice, this system also has problems. Although in theory an hourly system would incentivize attorneys to put in more effort on a particular case, there are typically caps on what attorneys can charge per case.<sup>125</sup> Once an attorney reaches that cap, she has little incentive to put in more work on that case and instead gains more revenue by seeking out fresh cases. Hence, defense attorneys in assigned counsel systems still are incentivized to maximize their caseloads even when they are paid by the hour.

2. *Caseload Incentives for Public Defenders.* One might view these distortions as proof that the best way to provide indigent defense is through a pure public defender system. Unlike assigned counsel systems, public defender salaries do not depend on the number of cases they are assigned.<sup>126</sup> Thus, from a financial perspective, there is no incentive to take on an excessive number of cases. And there is some

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124. Some empirical evidence supports this point. See Schwall, *supra* note 90, at 554 (showing that South Carolina attorneys reported working fifty percent less hours after the state shifted from hourly payments to a flat-fee system).

125. See, e.g., CRIM. JUST. GUIDELINES § 230.16 (2019) (setting a maximum hourly rate for appointed counsel in federal non-capital cases); *id.* § 230.23.20 (setting case maximums for same set of cases).

126. See NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 11 (2011), <https://www.in.gov/publicdefender/files/SecuringReasonableCaseloads.Book.pdf> [<https://perma.cc/6JCV-PZLB>] (“The public defender model employs salaried full-time or part-time lawyers.”); e.g., TENN. CODE ANN. § 8-14-207 (1989) (mandating that public defender compensation is calculated based on years of practice).

empirical evidence suggesting public defenders do, in fact, outperform assigned counsel in terms of outcomes for criminal defendants.<sup>127</sup>

Unfortunately, public defenders must deal with a different set of forces that also push their incentives away from those of their clients. Though public defenders have no financial incentive to take on additional cases, they often have little control over the number of cases they are assigned.<sup>128</sup> If a public defender's office is understaffed—as is invariably true across the United States<sup>129</sup>—then the supply of public defenders is insufficient to meet the influx of indigent criminal defendants who need representation.<sup>130</sup> Faced with a flood of cases, public defenders are forced to apportion their limited time among

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127. See Anderson & Heaton, *supra* note 116, at 154 (exploiting the random assignment of indigent murder defendants in Philadelphia to public defenders or court appointed private attorneys and finding public defenders “reduce their clients’ murder conviction rate by 19% and lower the probability that their clients receive a life sentence by 62%,” as well as “reduc[ing] overall expected time served in prison by 24%”); Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* 11–15 (Nat’l Bureau Econ. Rsch., Working Paper No. 13187, 2007), <https://www.nber.org/papers/w13187> [<https://perma.cc/C726-7RD5>] (exploiting random case assignments to determine that salaried federal public defenders outperform appointed, hourly compensated private counsel in terms of conviction rates and sentence lengths); see also FABELLO ET AL., IMPROVING INDIGENT DEFENSE, *supra* note 98, at 2 (finding that the Harris County Public Defender’s office delivered better defense outcomes than assigned counsel); David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment To Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145, 1145 (2007) (exploiting random assignments in Las Vegas, Nevada, and finding that being assigned a “veteran public defender with ten years of experience reduces the average length of incarceration by 17% relative to a public defender in her first year”).

128. See LEFSTEIN, *supra* note 126, at 20 (noting the majority of courts still appoint lawyers to represent indigent persons, and that “[w]hile the ethical duty to avoid excessive caseloads is clear, defense lawyers and heads of defender programs often are reluctant to seek to avoid court appointments or to withdraw from cases to which they have been appointed”). For an overview of reasons that keep public defenders from turning down cases, see generally John P. Gross, *Case Refusal: A Right for the Public Defender but Not a Remedy for the Defendant*, 95 WASH. U. L. REV. 253, 256–59 (2017).

129. See *The Sad State of the Public Defender in America*, FRED DAHR, <https://www.texasdefenselaw.com/library/sad-state-public-defender-america> [<https://perma.cc/67P2-VL5E>].

130. See, e.g., LEFSTEIN, *supra* note 126, at 17 (describing a witness from Pennsylvania who told an American Bar Association (“ABA”) committee that a county “had 4172 cases in 1980 but that the number of cases had grown to 8000 in 2000 without any growth in the staff size of the public defender’s office” (citing ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* 18 (2004) [hereinafter *GIDEON’S BROKEN PROMISE*], [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) [<https://perma.cc/7VBS-75RG>])).

them.<sup>131</sup> And once again, that creates pressure to dispose of cases quickly—or at least quicker and with less substantive investigation than if time were not a worry.<sup>132</sup>

Commentators and scholars have noticed that public defenders are not immune from these time pressures.<sup>133</sup> The American Bar Association (“ABA”) has addressed the issue head on,<sup>134</sup> stating that “defender organizations, individual defenders, assigned counsel or contractors for services . . . must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments” when accepting new cases or continuing with old cases would “lead to the furnishing of representation lacking in quality or to the breach of professional obligations.”<sup>135</sup>

3. *Caseload Incentives for Private Attorneys.* Now contrast the incentives of publicly funded attorneys with those of private attorneys—lawyers who represent private-paying clients. The two primary models by which private attorneys are paid are up-front fees

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131. See *id.* at 16–17 (detailing the disconnect between the amount of time public defenders have to work on cases and the amount of work and time required for these cases); see also Spangenberg & Beeman, *supra* note 86, at 36–37 (“[J]urisdictions with public defender programs have not allotted sufficient resources to keep pace with the ever-expanding caseload. The result has been that public defender staff attorneys are often asked to carry caseloads that make it difficult, if not impossible, to provide effective representation.”). For an eye-opening discussion on the problems facing public defender’s offices nationwide, watch John Oliver, *Last Week Tonight with John Oliver: Public Defenders*, YOUTUBE (Sept. 13, 2015), <https://youtu.be/USkEzLuzmZ4> [<https://perma.cc/EJ96-NANQ>].

132. Worse, some argue that given this excessive caseload, implicit bias may cause public defenders to “triage” their caseload in ways that hurt stigmatized groups, such as Black defendants. See L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2628 (2013).

133. Professor David Luban vividly captures the setting in which most public defenders and panel attorneys operate:

a world of lawyers for whom no defense at all, rather than aggressive defense or even desultory defense, is the norm; a world of minuscule acquittal rates; a world where advocacy is rare and defense investigation virtually nonexistent; a world where lawyers spend minutes, rather than hours, with their clients; a world in which individualized scrutiny is replaced by the indifferent mass-processing of interchangeable defendants.

David Luban, *Are Criminal Defendants Different?*, 91 MICH. L. REV. 1729, 1762 (1993).

134. See LEFSTEIN, *supra* note 126, at 37–43 (discussing ABA recommendations regarding the overwhelming caseloads of public defenders).

135. See *id.* at 37 (citing ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, Std. 5-5 (2d ed. 1980)). The ABA intentionally used the word “must” in referring to the need to take appropriate action when caseloads become excessive, rather than the word “should,” which is used for all of the remaining standards from the same chapter. *Id.* at 38. ABA Standard 5-5 has largely remained unchanged since it was first issued in 1980, though it might be revisited in future ABA releases. *Id.* at 37.

and retainers.<sup>136</sup> In an up-front fee system, the attorney asks a prospective client to prepay for criminal defense representation. In a retainer system, the client pays money up front into escrow. The funds are deducted from the account and transferred to the attorney as she racks up hours on the defendant's case.

The prepayment model is like the per-case payment model described for assigned counsel. Hence, private counsel has an incentive to take on a large number of cases just like assigned counsel do in that setting. The retainer model does not include this kind of distortion, since the attorney is paid for each hour worked regardless of which case she works on.<sup>137</sup>

Private attorneys, like most assigned counsel, have significant control over the number of cases they accept. But unlike assigned counsel, private attorneys do not face the same financial incentives to take on an overwhelming number of cases. This is because private attorneys typically operate in a market with other competing defense attorneys.

If a private attorney fleeces a client, or attains bad results for him, this might adversely affect her reputation and future clients might be less likely to hire that attorney.<sup>138</sup> To the extent the market serves as a disciplining force, it constrains private attorneys from acting too far out of line with their clients' interests. Because attorneys who are overloaded cannot represent their clients as effectively as those who are not, this market force at least in theory constrains the number of cases that private attorneys are likely to take on.<sup>139</sup>

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136. See Sara J. Berman, *Paying a Private Criminal Defense Attorney*, NOLO, <https://www.nolo.com/legal-encyclopedia/paying-private-criminal-defense-attorney.html> [<https://5YBU-QG7N>].

137. Of course, the attorney might have an incentive to overcharge in this setting by working maximally on the easiest tasks, thereby minimizing effort but maximizing revenue.

138. This dynamic might be even greater today than in years past, since websites like Avvo.com include detailed client reviews of criminal defense attorneys. Numerous instances of bad client reviews are swiftly met by explanations or mea culpas by the offending attorney. Like Yelp reviews for restaurants, one credible bad review can be devastating for business.

139. Since private criminal defense attorneys typically earn higher wages than publicly funded defense counsel, the former might choose to substitute more leisure time for work relative to the latter. See *How Much Do Criminal Lawyers Make?*, INDEED (Feb. 25, 2020), <https://www.indeed.com/career-advice/pay-salary/criminal-lawyer-salary> [<https://perma.cc/KET3-9766>] (stating that the national average salary for a public defender is \$60,839 per year, whereas the national average salary for a private defense attorney is \$89,961 per year). On the other hand, if their demand for leisure increases as they get richer, which seems likely, then this off-setting "income effect" might lower the number of cases they choose to take on. Put in simple terms, if

By contrast, no such market force exists to discipline counsel in indigent defense cases, whether assigned, contract, or public defender. Because indigent defendants do not select their own lawyers, they are typically at the whim of whomever is chosen by a court or independent body as their representative. And, as demonstrated below, that choice might not be random, but instead determined based on financial forces that have little regard for a defendant's well-being or best interests.

### III. THE INCENTIVE GAP AND JUDICIAL PAY TO PLAY: AN EMPIRICAL ANALYSIS OF CAMPAIGN FINANCE AND INDIGENT DEFENSE IN HARRIS COUNTY, TEXAS

In this Part, we provide empirical support for the claim that campaign finance exacerbates the incentive gap in the right to counsel. Using detailed data from Harris County, we empirically analyze the relationship between attorney donations to elected judges and appointments to indigent defense cases. Our results are strongly consistent with qualitative evidence that we also present: judges appoint their donors to a disproportionate number of cases, consistent with a system in which pay to play regularly occurs. Moreover, if anything, donor attorneys appear to underperform for their clients relative to non-donors, even after controlling for case and defendant characteristics.

This Part begins by explaining in detail how judicial elections and court appointments work in Harris County. Next, it describes how we constructed our linked dataset, which is the first large-scale dataset that connects criminal court data with donations to trial court judges. Finally, this Part analyzes the data and presents evidence of pay to play in indigent defense.

#### A. *Background and Qualitative Evidence on Judicial Pay to Play in Harris County*

1. *Courts and Judicial Elections.* The state of Texas has 254 counties, more than any other state.<sup>140</sup> This translates into 252 county courts of law that primarily handle misdemeanor offenses<sup>141</sup> and 472

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private attorneys are earning high enough wages, they might decide it is not worth it to take on an excessive number of cases even though they could earn more by doing so.

140. FABELLO ET AL., IMPROVING INDIGENT DEFENSE, *supra* note 98, at 9.

141. TEX. OFF. OF CT. ADMIN., COUNTIES WITH COUNTY COURTS AT LAW 1 (2019), [https://www.txcourts.gov/media/1444575/countycourtsatlaw\\_september2019.pdf](https://www.txcourts.gov/media/1444575/countycourtsatlaw_september2019.pdf) [<https://perma.cc/Q8G7-USRX>]; TEX. CTS., COURT STRUCTURE OF TEXAS 1 (2019) [hereinafter TEXAS CTS., COURT

district courts for felony offenses.<sup>142</sup> Texas’s court system is said to be “designed to discourage the accumulation of power,”<sup>143</sup> resulting in a system with “numerous elected officials at every level, for every branch, [that has] shaped the state’s unstructured approach to indigent defense.”<sup>144</sup>

Our data come from Harris County, home to over 4.71 million people<sup>145</sup> and the third most populous county in the United States.<sup>146</sup> The county comprises all of the city of Houston and a few major suburbs. Here we focus on the sixty district criminal courts located in Harris County,<sup>147</sup> which handle all state felony cases.

Like all judges in Texas,<sup>148</sup> Harris County district judges are elected. They serve four-year terms,<sup>149</sup> with roughly half elected in the November of off-presidential election years and the other half elected in the November of presidential election years.<sup>150</sup> District judges take office on January 1 of the year following an election.

Typically, judicial elections in Harris County are not uncontested. Rather, there is a party primary followed by a partisan general election, where one Democrat runs against one Republican. In the early 2000s, Republicans controlled most of the judicial seats in Harris County. Beginning in 2008, however, Democrats found more electoral success in judicial elections as the county shifted politically toward the left.<sup>151</sup>

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STRUCTURE], <http://www.txcourts.gov/media/1443399/court-structure-chart-jan-2019.pdf> [<https://perma.cc/S774-PWY5>] (noting that Texas county-level courts handle misdemeanors punishable by confinement).

142. TEX. CTS., COURT STRUCTURE, *supra* note 141.

143. FABELO ET AL., IMPROVING INDIGENT DEFENSE, *supra* note 98, at 9.

144. *Id.*

145. See *QuickFacts, Harris County, Texas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/harriscountytexas> [<https://perma.cc/9F66-R5M7>] (stating that the estimated population of Harris County as of July 1, 2019, is 4,713,325).

146. FABELO ET AL., IMPROVING INDIGENT DEFENSE, *supra* note 98, at 11.

147. TEX. CTS., STATE DISTRICT COURTS 1 (2019), <https://www.txcourts.gov/media/1445220/district-court-map-october-2019.pdf> [<https://perma.cc/33BW-P2HJ>].

148. Texas has had partisan election of judges at all levels of courts since 1876. *Judicial Selection in the States: Texas*, NAT’L CTR. FOR STATE CTS. [hereinafter *Judicial Selection*], [http://www.judicialselection.us/judicial\\_selection/index.cfm?state=TX](http://www.judicialselection.us/judicial_selection/index.cfm?state=TX) [<https://perma.cc/44H4-25E6>].

149. *See id.*

150. *Election Results, HARRIS CNTY. CLERK*, <https://www.harrisvotes.com/ElectionResults?lang=en-US> [<https://perma.cc/E7P7-6T7W>].

151. Based on data we compiled from the Harris County Clerk website, *see id.*, we found that out of 37 district court elections between 2002 and 2006, all 37 were won by Republican candidates. By contrast, out of 53 district court elections between 2008 and 2016, (about 37.7 elections) were won by Democrats.

At any rate, there have been a fair number of close general elections in Harris County throughout the early part of this century.<sup>152</sup>

Campaign finance has also been an integral part of the judicial landscape in Texas for decades. In 1980, Texas was the first state to have a judicial race costing over \$1 million; the 12 candidates in the 1988 supreme court elections raised \$12 million in total.<sup>153</sup> The 7 winning candidates for the Texas supreme court from 1992–1997 each raised an average of \$1.3 million, with more than 40% of those funds “contributed by parties or lawyers with cases before the court or by contributors linked to those parties.”<sup>154</sup> As shown below, Harris County district judges also actively raise money for their campaigns, often from attorneys who practice before them.<sup>155</sup>

2. *Indigent Defense Case Assignments.* Like most of Texas and many other states,<sup>156</sup> Harris County relies primarily on assigned counsel to provide indigent defense, where judges are supposed to distribute cases to attorneys via a wheel that rotates through a list of eligible lawyers.<sup>157</sup> Such systems are prevalent throughout Texas, as

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152. Using the same data, *see id.*, we found that the margin of victory was less than 2 percentage points in 13.33% of elections (12 out of 90) and less than 5 percentage points in 30% of elections (27 out of 90).

153. *Judicial Selection*, *supra* note 148.

154. *Id.*

155. *See infra* Part III.C.1.

156. TEX. INDIGENT DEF. COMM’N, PRIMER, *supra* note 98, at 3; Spangenberg & Beeman, *supra* note 86, at 33.

157. FABELO ET AL., IMPROVING INDIGENT DEFENSE, *supra* note 98, at 12. Currently, to be added to the master list of eligible attorneys, licensed Texas attorneys who are in good standing must have at least two years of criminal law practice experience, pass a certification test (or be board certified in criminal law), and satisfy certain continuing legal education requirements. *Minimum Requirements, Appointed Attorney Candidates*, HARRIS CNTY. DIST. CTS., <https://www.justex.net/JustexDocuments/0/FDAMS/2017/quickGuide.pdf> [<https://perma.cc/J32P-BN5D>]. To be assigned third-degree felony cases, the attorney must have “[t]ried to verdict at least three (3) felony jury trials as lead counsel.” *Id.* To be assigned second-degree felony cases, she must have “[p]racted criminal law for at least four (4) years and tried to verdict at least four (4) felony jury trials as lead counsel.” *Id.* And to be assigned first-degree felony cases, the attorney must have “[p]racted criminal law for at least five (5) years, tried to verdict at least eight (8) felony jury trials as lead counsel and been accepted as competent to receive first-degree appointments by a majority of the district judges.” *Id.* The attorney must also “[e]xhibit proficiency and commitment to providing quality representation to criminal defendants [and] [d]emonstrate professionalism and reliability when providing representation to criminal defendants.” *Id.* Finally, the attorney must be voted onto the master list by a majority of district court judges. *Id.* According to a local defense attorney, these testing requirements did not always exist, and were only added after counsel assignments in Harris County came under increased scrutiny. Murray Newman, *Too Much for Too Few*, LIFE AT THE HARRIS CNTY. CRIM. JUST. CTR. BLOG (Jan. 26, 2013, 1:03 PM), <http://harriscountycriminaljustice.blogspot.com/2013/01/too-much-for-too-few.html> [<https://>

only nine counties in the state currently have public defender's offices.<sup>158</sup> Harris County is one of those counties, though in reality, it only assigns a small percentage of cases to its public defender. Although the county created a public defender's office in 2010, the Harris County public defender handles less than three percent of the cases in our sample.<sup>159</sup> Moreover, these public defenders are simply treated as additional attorneys to be added to the wheel.<sup>160</sup> Hence for all practical purposes, Harris County relies almost exclusively on assigned private attorneys for indigent defense.<sup>161</sup>

3. *Attorney Donations and Case Assignments.* News articles and interviews reveal how deeply Harris County has struggled with indigent defense case assignments over the past many decades. Former State Senator Rodney Ellis, now county commissioner for Precinct One in Harris County, notes a common refrain: "Judges who will remain nameless still try and tell me that the judge picking the lawyer is better [than a statewide public defender system] . . . because they pick people who are capable. How do you say that with a straight face?"<sup>162</sup>

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perma.cc/KNG7-ZTJ2].

158. MAPPING AM. PUB. DEF. PROJECT, <https://safe-stream-85568.herokuapp.com> [<https://perma.cc/B2AP-SXBB>].

159. See *infra* Table 1 (noting that 7,853 cases were assigned to public defenders out of 290,633 total cases in our sample, which is approximately 2.7%); see also *infra*, note 181 and accompanying text. This number has been increasing over time; our data show that the Harris County public defender handled just over 5% of the felony cases in 2017.

160. See, e.g., FABELO ET AL., IMPROVING INDIGENT DEFENSE, *supra* note 98, at 31 (noting that one division of the Harris County public defender's office appears on the wheel for random assignments).

161. See *id.* at 19–20 (explaining the size and scope of public defender representation in Harris County is small, "as it is currently designed to absorb only 5–6% of the overall docket, particularly in felonies and misdemeanor trial-level cases"); see also *Texas: Quick Guide, GIDEON AT 50*, <http://gideonat50.org/in-your-state/texas/#state-independence> [<https://perma.cc/7JNS-6YCB>] ("The vast majority of Texas indigent defense representation, even in those jurisdictions that have a public defender office, is provided by appointed attorneys.").

162. Neena Satija, *How Judicial Conflicts of Interest Are Denying Poor Texans Their Right to an Effective Lawyer*, TEX. TRIB. (Aug. 19, 2019, 12:00 AM) [hereinafter Satija, *Judicial Conflicts of Interest*], <https://www.texastribune.org/2019/08/19/unchecked-power-texas-judges-indigent-defense> [<https://perma.cc/Y9SN-7C4Y>]. A recent time-use study showed that Texas indigent defense attorneys spend remarkably little time on cases they are assigned. See DOTTIE CARMICHAEL, AUSTIN CLEMENS, HEATHER CASPERS, MINER P. MARCHBANKS III & STEVE WOOD, GUIDELINES FOR INDIGENT DEFENSE CASELOADS: A REPORT TO THE TEXAS INDIGENT DEFENSE COMMISSION xv (2015), [http://www.tidc.texas.gov/media/31818/150122\\_weightedcl\\_final.pdf](http://www.tidc.texas.gov/media/31818/150122_weightedcl_final.pdf) [<https://perma.cc/ZCP5-WCSW>] (conducting a time-use study of Texas indigent defense attorneys and finding the following average disposal times for these classes

Attorneys practicing in Harris County echo Ellis's concern about the efficacy and ethics underlying indigent appointments there. Houston criminal defense attorney Robert Fickman describes one of the ways that attorneys seeking appointments curry favor with the judges who assign them cases:

There's a certain number of court-appointed lawyers who appear to be appointed primarily for their ability to move the docket . . . . The trade-off is that the judge is appointing Lawyer X to lots of cases, and in return for the appointments, Lawyer X is moving those cases, which meets the judge's objective.<sup>163</sup>

Sometimes the quid pro quo is even more explicit. Drew Willey, a criminal defense attorney practicing in Houston and nearby Galveston County, describes witnessing pay to play firsthand while working as a new lawyer under a retired judge who took many felony appointments in Harris County:

A few months into working on his cases, [the attorney] told us that he'd be charging us a monthly fee out of our hourly pay to donate to [the] judge's campaign funds. He said these donations were necessary to keep his lights on and keep allowing him to pay us. Me and one colleague were abhorred enough to speak up. We approached this attorney separately, strongly voicing our opposition to this systematized pay for play conflict. He told me and that one colleague that we were exempt from being charged his donation fee, but continued to make the donations, openly admitting it was so that he could continue to get more appointments in those courts . . . . [After I left his office,] I know the pay for play continued, because that attorney later, in passing, told me that the elections of new judges meant that he "lost" some courts and had to begin donating more to different judges in order to keep getting appointments.<sup>164</sup>

Willey also reports that the prevalence of pay to play adversely affects the quality of representation that indigent defendants receive:

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of cases: Class B misdemeanor (4.7 hours); Class A misdemeanor (7.6 hours); state jail felonies (10.8 hours); third-degree felonies (12.9 hours); second-degree felonies (15.2 hours) and first-degree felonies (22.3 hours)). The report suggested that an attorney's annual caseload should not exceed: "236 Class B Misdemeanors[,] 216 Class A Misdemeanors[,] 174 State Jail Felonies[,] 144 Third Degree Felonies[,] 105 Second Degree Felonies[, or] 77 First Degree Felonies." *Id.* at 34.

163. Jo DePrang, *Poor Judgment*, TEX. OBSERVER (Oct. 12, 2015, 8:56 AM), <https://www.texasobserver.org/poor-judgment> [<https://perma.cc/753Z-LA4V>]; see also Bright, *supra* note 24, at 859 ("Some judges appear more concerned about cost containment and administrative efficiency than insuring a zealous defense.").

164. Interview with Drew Willey, Crim. Def. Att'y (Sept. 26, 2019) (on file with Authors).

[T]he disparities [in caseloads among attorneys make it] obvious that pay to play is continuing in some very specific courts. This level of corruption leads to human lives being forgotten in jail without anyone to stand up for them. We've handled cases in which these overloaded attorneys have not even visited their clients for 6–10 months at a time—pretrial.<sup>165</sup>

Notably, these types of behavior are not limited to Harris County's adult felony courts. A 2008 *Houston Chronicle* analysis of the juvenile appointment system found that “[a] relatively small group of attorneys, some of them old friends and all financial backers of judges handing out work, regularly receives close to half of all the tax-funded appointments to represent the poor in the juvenile courts . . . .”<sup>166</sup> These concerns continue today, as a recent report indicates that “a handful of private attorneys—some of whom happened to be generous contributors to judges’ campaign coffers—got more than 300 [case assignments]” while “juvenile public defenders received fewer and fewer appointments over several years, so that in 2017 they each had an average load of 140 juvenile cases, which is below the office’s imposed limit of 200 . . . .”<sup>167</sup>

### B. Construction of the Data

In this Section, we explain how we combined numerous datasets to show more precisely how campaign contributions might affect indigent defense case assignments in Harris County. Specifically, we combine six types of data from Harris County: (1) criminal cases and their outcomes; (2) judicial elections; (3) campaign contributions to judicial candidates; (4) annual revenue earned by attorneys for indigent defense appointments; (5) attorney eligibility for indigent defense appointments; and (6) attorney bar information. Figure 1 summarizes the relevant information in these datasets and how we link them together.

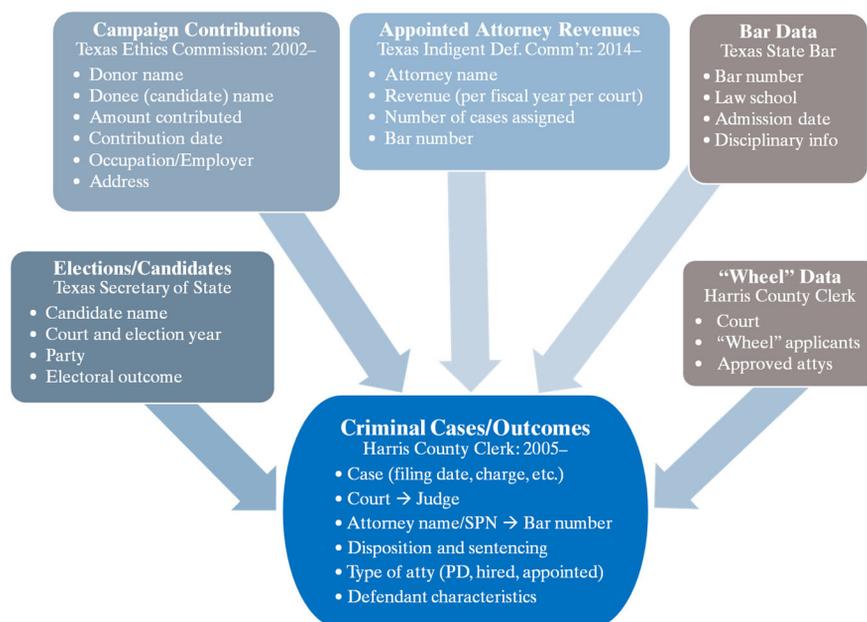
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165. *Id.*

166. Sarah Viren, *Lawyers Picked for Juveniles Give Campaigns Cash*, HOUS. CHRON. (Apr. 20, 2008, 5:30 AM), <https://www.chron.com/news/houston-texas/article/Lawyers-picked-for-juveniles-give-campaigns-cash-1759443.php> [<https://perma.cc/2Z8Y-ND92>]; see also Neena Satija, *Harris County Juvenile Judges and Private Attorneys Accused of Cronyism: “Everybody Wins but the Kids.”* TEX. TRIB. (Nov. 1, 2018, 12:00 AM), <https://www.texastribune.org/2018/11/01/harris-county-texas-juvenile-judges-private-attorneys> [<https://perma.cc/3VY8-JAK6>] (“[Harris] [C]ounty’s three juvenile district courts . . . have been assigning an extraordinary number of cases to a handful of private lawyers.”).

167. Satija, *Judicial Conflicts of Interest*, *supra* note 162.

FIGURE 1: HARRIS COUNTY DATASETS



Our central dataset tabulates criminal cases and outcomes provided to us electronically upon request by the Harris County district clerk (“HCC”) in 2018 and 2019. We focus on felony cases in the dataset, which comprise the universe of all such cases disposed in Harris County district court from January 2005 through May 2018. The dataset includes information on all indigent defense counsel appointments made by district judges during that time period, as well as the characteristics of the cases to which they were assigned. The HCC dataset includes the full name and an identifier for the appointed attorney;<sup>168</sup> the type of appointment (either public defender, appointed attorney, or hired attorney); the defendant’s full name, sex, age, race, and address; and case characteristics like the offense level and degree, sentence type and sentence duration, and filing and disposition dates.

We combine these data with a dataset on Harris County judicial elections, compiled by parsing PDFs of election results provided by the

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168. The identifier is a System Person Number (“SPN”), used to identify the individual throughout the dataset. We converted the SPN number into the corresponding attorney bar number, allowing us to merge it with attorney-related data in other datasets.

Harris County clerk on its website.<sup>169</sup> Although the HCC case data do not include the name of the presiding district judge, we can identify this information by looking at electoral outcomes for district court races and identifying each judge's electoral history. Thus, by merging these data, we can precisely identify which judge appointed which counsel in an indigent defense case.<sup>170</sup>

Next, we connect the data to campaign contributions data, provided electronically by the Texas Ethics Commission ("TEC") on its website.<sup>171</sup> This dataset encompasses all political contributions to district court candidates in Texas from 2004 to 2016.<sup>172</sup> The TEC dataset includes information on contribution dates and amounts, along with self-reported identifying information from contributors such as occupation, employer, and zip code.<sup>173</sup> This information supplements the case data with identifiers for attorneys who have contributed to the appointing judge, which might happen before, during, or after the judge's tenure.<sup>174</sup>

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169. See *Election Results*, *supra* note 150.

170. We also know which judicial candidates received donations from eligible attorneys but failed to be elected. In related work, we are conducting a regression discontinuity design to measure the effect of donations on appointments. For a guide to regression discontinuity designs, see generally David S. Lee & Thomas Lemieux, *Regression Discontinuity Designs in Economics*, 48 J. ECON. LITERATURE 281 (2010). In particular, we can causally estimate the impact of donations by comparing case appointments for attorneys who donated to judicial candidates who barely won an election versus case assignments for attorneys who donated to candidates who barely lost.

171. See *Search Campaign Finance Reports*, TEX. ETHICS COMM'N, <https://www.ethics.state.tx.us/search/cf> [https://perma.cc/AEN5-5E2R].

172. Contributions data prior to 2004 are not particularly accurate and are hence excluded from our data. Consequently, we might underestimate the number of contributions received by judges who held office prior to 2005.

173. Some attorney contributors list themselves using the name of their private practice; for example, John Doe might donate as "Law Offices of John Doe." If a law firm has just one named partner, we assign that contribution to the named partner. When a law firm has more than one named partner, or it is unclear who the main partner is, we do not assign such contribution to any attorney. To illustrate, contributions under the name of "The Law Firm of John Doe" would be attributed to John Doe, while contributions from "Do, Re, Mi and Associates" would not be attributed to anyone. Since we cannot capture these donations, we likely underestimate the number of donations from attorneys to judges in our sample. In addition, in 81 instances, matched attorneys contributed jointly with their spouses or someone else. In all of these cases, only one of the names in the pair matched to someone in the list of appointed attorneys. We dropped the unmatched contributor name off our list of contributors and attribute the whole donation amount to the appointed attorney.

174. Matching the contributors in the TEC dataset to the attorneys in the HCC dataset is not easy. This is in part because the TEC lacks any unique identifier for political contributors, and does not provide other identifying data like mailing address and employer. We take advantage of the name variation in the HCC dataset to identify different ways that attorneys might list their

The fourth dataset we connect are payments made by the state of Texas to appointed attorneys. This information is tracked and provided online by the Texas Indigent Defense Commission (“TIDC”)<sup>175</sup> and is comprehensive and accurate for 2014–2018.<sup>176</sup> The TIDC data include information on how much each attorney earned in total from each court (that is, each judge) during each fiscal year 2014–2018.

The TIDC data do not provide granular detail as to specific attorney payments, as in payments made based on the number of days an attorney appeared in court or worked on a case outside of court. The data do, however, include attorney bar numbers, which allow us to accurately merge the revenue data with our cases database. Therefore, the HCC case data can be connected with both attorney contributions data and attorney revenue data. This allows us to estimate a return on investment for donors. That is, if pay to play exists, we can estimate the revenue that donor attorneys received for each dollar they contributed.

The fifth dataset connects our data to information on attorneys who are appointed to cases in the district court, as compiled by the State Bar of Texas on its website.<sup>177</sup> This dataset includes demographic information on attorneys, including when the attorney obtained their legal license in Texas and what law school they attended.<sup>178</sup> We also obtain this information for all judges in our dataset, allowing us to test

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names for contribution purposes. We use these names to look for political contributions made by attorneys who have been appointed at least once in any district court in Harris County. For attorneys unmatched by their exact listed name, we do a second round of matching using fuzzy matches between unmatched attorney names and contributor names. We accomplish this by using the Stata function *matchit* to compare each name with the neighborhood of the subsequent five unmatched names in alphabetical order. After that, we look at the matches suggested and keep the suggestion only if the similarity is above a certain threshold (.85). Finally, we manually audit the data to confirm the matches we have made are not false positives and to search for matches we may have missed.

175. See *Statewide Attorney Caseload Report*, TEX. INDIGENT DEF. COMM’N, <http://tidc.tamu.edu/public.net/Reports/AttorneyCaseLoad.aspx> [<https://perma.cc/5CF9-WWK6>].

176. Note that we could obtain reliably accurate revenue only for fiscal years 2014–2018, but our donation data stretch from 2004–2018. Hence, the actual return on investment might be significantly higher than what we estimate here. Our estimate is likely only a floor on the real return rate.

177. We thank Professor Kyle Rozema for providing us with the Texas bar data. See generally Kyle Rozema, *Lawyer Misconduct in America* (Jan. 2, 2020) (unpublished manuscript), <https://www.law.umich.edu/centersandprograms/lawandeconomics/workshops/Documents/Paper%20%20Kyle%20Rozema.Lawyer%20Misconduct%20in%20America.pdf> [<https://perma.cc/PLZ9-WHXD>] (scraping bar data from Texas and eighteen other states to create a novel dataset on lawyer misconduct).

178. We also merge this dataset with 2020 data from *U.S. News and World Report*, which provides an annually updated, widely followed list of law school rankings. This allows us to compare the law schools attended by donor and non-donor attorneys.

whether certain social networks might be driving results, such as an attorney or judge being approximately the same age or attending the same law school.

Finally, we combine all these data with information on when attorneys applied for approval as indigent defense counsel, obtained electronically in 2019 after an information request to the Harris County district court. Per the detailed discussion below, we can see whether attorney donations were correlated with their addition to the list of eligible indigent defense counsel, known as “the wheel.” For example, if pay to play exists, we might expect to see an attorney donating to a judge when she applies for or is approved to be added to the wheel.”

### C. *Summary Statistics*

1. *Cases and Contributions.* Together, these datasets shed light on the relationships between Harris County district court judges and indigent defense counsel. Table 1 provides some summary statistics on our final data.<sup>179</sup> We cover the universe of 290,633 felony cases<sup>180</sup> in which indigent defense counsel were assigned and ascertainable in Harris County between January 2005 and May 2018, spread over all 22 district courts. There were 45 different judges who assigned counsel in these cases. The vast majority of the cases—97.30%—were assigned to private attorneys; the remainder were assigned to a public defender.<sup>181</sup>

Attorneys who practiced before these judges also donated money to those judges. In particular, we see that from 2004–2018,<sup>182</sup> Harris County district court judges received a total of \$622,917 over 1,841

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179. Our final dataset does not include information on ninety cases for which we were unable to match the attorney to a lawyer listed in state bar attorney rolls. It also does not include 35 cases in which the listed defense attorney was identical to the judge in the case. These discrepancies are likely due to minor clerical errors in the cases dataset.

180. Harris County assigns a unique case number to each charged offense, even if they are actually part of the same case. This might occur, for example, if a prosecutor charges a defendant for one crime, then dismisses those charges completely and charges for a different crime later. To account for such scenarios, we treated different case numbers as part of the same case if the two case numbers involved the same attorney, court, and defendant identifier, as well as sharing either the same filing date or the same disposition date. Our results remain robust to different aggregation methods, or if we instead conducted the same analysis at the charge-level rather than the case-level. Moreover, the vast majority of cases (87.47%) in our sample involved just one charged offense.

181. Because public defenders are also assigned to the wheel system, and are treated as attorneys to be appointed in cases, we include them in our analysis below. However, our results are substantially the same if we exclude them instead.

182. While our case data begin in 2005, we include donations data from 2004 onward since judges who began their terms in 2005 ran for election in 2004.

donations from attorneys who practiced at some point before those judges. These donations were relatively modest in size—the average donation was \$338.36, with donations rarely exceeding \$1,500.<sup>183</sup>

TABLE 1: SUMMARY STATISTICS ON CASES AND CONTRIBUTIONS

<b>Felony Cases with Appointments: 2005–2018</b>	
Total number of cases and attorneys:	290,633 cases, 772 attorneys
Appointed private attorneys	282,780 cases, 747 attorneys
Appointed public defenders	7,853 cases, 66 attorneys
Number of courts	22
Number of judges	45
Number of general elections	8
<b>Campaign Contributions: 2004–2018</b>	
Total number of donations: all appointed attorneys to all judges	1,841
Total donation amount: all appointed attorneys to all judges	\$622,917
<b>Contribution Amounts for Appointed Attorneys</b>	
Mean (SD)	\$338.36 (329.12)
1%	\$50
10%	\$100
25%	\$150
50%	\$250
75%	\$500
95%	\$1,000
99%	\$1,500

Next, we examine case and attorney characteristics, both in the aggregate as well as split out by donor and non-donor attorneys. Table 2 summarizes these data below. Of the 772 attorneys who were assigned at least one indigent defense case between 2004–2018, 25.65% (198 attorneys) donated to at least one Harris County district court

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183. The smallest donation in the sample was \$25; the largest was \$5,000.

judge (or candidate who was elected judge) during our sample time frame.

TABLE 2: DONORS VS. NON-DONORS—CASE CHARACTERISTICS FOR APPOINTED ATTORNEYS (2005–2018)

	All	Donor	Non-Donor
<b>Number of Attorneys</b> <sup>a</sup>	772	198 (25.65%)	574 (74.35%)
<b>Felony Type</b> <sup>b</sup>			
1 <sup>st</sup> Degree Felony	6.28%	6.88%	6.13%
2 <sup>nd</sup> Degree Felony	16.07%	16.67%	15.92%
3 <sup>rd</sup> Degree Felony	22.28%	22.01%	22.35%
State Jail Felony	53.41%	52.35%	53.67%
Capital Felony	0.17%	0.27%	0.14%
<b>Defendant</b> <sup>b</sup>			
% White	45.81%	43.72%	46.33%
% Female	20.30%	20.38%	20.28%
Mean Age (years)	33.42	33.35	33.44
<b>Attorney Characteristics</b> <sup>b</sup>			
Average rank of law school attended	116.35	107.43	118.60
Years since admission	22.95	25.36	21.09

<sup>a</sup> “Donor” = 1 if attorney donated at least once to some judge during sample period

<sup>b</sup> “Donor” = 1 if attorney donated at least once to the assigning judge during sample period

Donors and non-donors were assigned similar types of cases, though donors on average handled slightly more serious felonies.<sup>184</sup> For example, first-degree felonies make up a slightly higher share of donor cases (6.88%) as compared to non-donor cases (6.13%). And state jail felonies—which are the least severe class of felony in Texas—make up

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184. Even though the magnitude of most differences between donor and non-donor groups in Table 2 is small, they are statistically significant at the 5% level, with the exception of defendant age and gender. This is due to the large sample size we have here, which lets us detect even small differences across groups.

52.35% and 53.67% of all cases for donors and non-donors, respectively.<sup>185</sup>

The demographic characteristics of defendants assigned to donors and non-donors are also quite similar. Donors were slightly less likely to represent White defendants relative to non-donors (43.72% versus 46.33%). Both groups were very similar in terms of their clients' gender and age—just under 80% were male, with an average age of about 33 for both groups.

Finally, donor and non-donor attorneys are relatively similar in terms of their educational and experiential background. The average law school ranking of an assigned attorney in our sample is 116.35, though donor attorneys attended slightly better-ranked law schools (average of 107.43) relative to non-donors (average of 118.60). Donor attorneys also have more experience, as measured by years between the attorney's admission to the Texas bar and the filing date of a case (25.36 versus 21.09 years).

2. *Donations, Appointments, and Revenues.* As described above, there are only slight measurable differences in the types of cases and types of defendants assigned to donor and non-donor indigent defense counsel. Donor and non-donor defense counsel also appear largely similar in terms of their educational and experiential background.

By contrast, there are stark differences between donor and non-donor attorneys in terms of the number of cases assigned to them by donee judges, as well as the fees they earned from such cases. This is clear from Table 3 below, which shows summary statistics on appointed cases and received revenues across all attorneys, as well as split out between donors and non-donors.

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185. Offense level was missing in 4,092 cases (1.41% of the total sample). Those cases have been excluded from the data when tabulating the percentages in Table 2.

TABLE 3: DONORS VS. NON-DONORS—CASES APPOINTED AND REVENUES  
(2005–2018)

	All	Donor	Non-Donor
<b>Number of Attorneys</b> <sup>a</sup>	772	198 (25.65%)	574 (74.35%)
<b>Cases Appointed: Any Donation</b> <sup>a</sup>	—	152,200 (52.37%)	138,433 (47.63%)
<b>Cases Appointed: Donate to Appointing Judge</b> <sup>b</sup>	—	58,588 (20.16%)	232,045 (79.84%)
<b>Average Case Pendency (days)</b> <sup>b</sup>	105.77	108.77	105.02
<b>Attorney–Judge Pairs</b> <sup>b</sup>			
Number of Observed Pairs	10,723	1,107 (10.32%)	9,616 (89.68%)
Average Revenue by Pair	\$16,300	\$31,081	\$13,992
Average Number of Cases Assigned Per Pair	27.10	52.93	24.13

<sup>a</sup> “Donor” = 1 if attorney donated at least once to some judge during sample period

<sup>b</sup> “Donor” = 1 if attorney donated at least once to assigning judge during sample period

As noted previously, over one-quarter of assigned attorneys contributed to at least one judge within our sample period. But these donor attorneys were assigned over half (52.37%) of the cases in our sample. Moreover, 20.16% of all cases in which a judge assigned indigent defense counsel involved an attorney who donated at some point to that specific judge.

The disparity in case assignment between donor and non-donor attorneys becomes clearer when we look at attorney–judge pairings—that is, unique pairings between judges and attorneys who were assigned at least one indigent defense case in our sample period. Out of 10,723 attorney–judge pairings in our sample, 1,107 (10.32%) involved an attorney who at some point donated to that judge.

On average, an attorney in an attorney–judge pairing was assigned 27.10 indigent defense cases from that judge and earned \$16,300 in indigent defense fees for those cases, yielding an average of \$601.48 per case. This shows us how indigent defense cases can be surprisingly

lucrative if, as often occurs, an attorney spends just one or two days in total on each case she is assigned. To illustrate, an attorney who handles one such case each day and works 200 days a year would earn \$120,296.<sup>186</sup>

We can also see that an average non-donor attorney was assigned slightly fewer cases—24.13 cases, with earnings of \$13,992, or an average of \$579.86 per case. By contrast, the average donor was assigned more than twice the number of cases by that judge and earned more than twice the revenue on those cases relative to the average non-donor—52.93 cases and \$31,081 in revenues. Donors earn approximately the same as non-donors per case (\$587.21), which suggests their additional revenue comes from the additional cases they are assigned, not from additional revenue per case assigned.

We can more easily show these differences between donors and non-donors graphically, as depicted in the histograms in Figure 2 below. Like before, these graphs look at unique attorney–judge pairs. The top panel of Figure 2 shows the natural log of cases<sup>187</sup> assigned to attorneys who donated to the appointing judge. The gray bars show the distribution of cases assigned to non-donor attorneys while the white bars show the distribution of cases assigned to donors. The white distribution is shifted to the right relative to the gray distribution. This means that donor attorneys were assigned more cases than non-donor attorneys.<sup>188</sup>

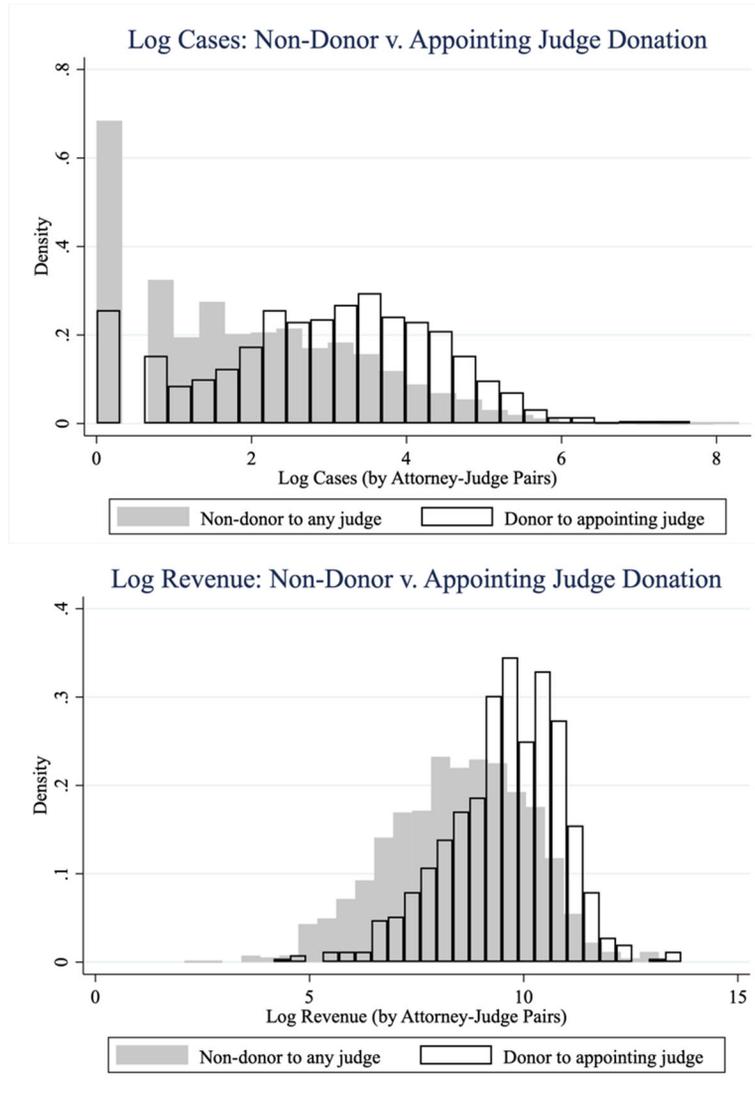
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186. Contrast this with public defenders, which were estimated to earn median entry-level salaries of \$58,000, and “increasing to about \$96,000 . . . for those with 11–15 years of experience.” Press Release, Nat’l Ass’n for L. Placement, *New Public Service Attorney Salary Figures from NALP Show Slow Growth Since 2004* 1 (July 9, 2018), [https://www.nalp.org/uploads/PSASR\\_7-9-18\\_FINAL.pdf](https://www.nalp.org/uploads/PSASR_7-9-18_FINAL.pdf) [<https://perma.cc/3ME7-UZNM>]; see also *Public Defender Salary in Texas*, ZIPRECRUITER (last updated Sept. 6, 2020), <https://www.ziprecruiter.com/Salaries/How-Much-Does-a-Public-Defender-Make-a-Year—in-Texas> [<https://perma.cc/SW8R-N6MD>].

187. It is common to take the natural log of variables that are positive and highly skewed—in other words, when there are a few entries that are very large relative to others. Often this includes revenue or income, or count variables such as number of cases. For display purposes, logging variables also compresses the histogram into a more reasonable range. At any rate, the results are very similar in graphs in which the standard count rather than the natural log is used.

188. Note that when we compare how many cases a judge assigned to donor attorneys versus non-donor attorneys, we are comparing among the class of attorneys who appeared at least once before that judge. Hence, our results are not just a product of the judge simply being unaware of the non-donor attorneys. The judge did in fact appoint each of the non-donor attorneys at least once during our sample period, and hence, presumably knew who they were and could have appointed them more times.

FIGURE 2: APPOINTMENTS AND REVENUES FOR DONOR VS. NON-DONOR ATTORNEYS



This relationship is even more apparent when revenue is examined. The bottom panel of Figure 2 shows log revenue for donor attorneys (in white) versus log revenue for non-donors (in gray). Once again, the distribution for donor attorneys is clearly shifted to the right—that is, attorneys who donated to a judge received more revenue than attorneys who did not donate to any judge.

*D. Pay to Play: Regressions and Graphical Evidence*

1. *Donations, Appointments, and Revenues.* The summary data show clear differences in assignment patterns to donors and non-donors. In particular, donee judges assign twice the number of cases to their donors relative to non-donors. Still, such results might be explained by differences, observable or unobservable, across attorneys or judges.

To illustrate how this might happen, suppose that donors are just *better* attorneys. Then maybe it makes sense for judges to award them more cases—not because they are donors but because they are simply higher quality lawyers. Indeed, perhaps attorneys who can afford to give donations are implicitly demonstrating, through their wealth, their legal prowess. If this were true, we might expect the donor group to comprise more successful attorneys who “deserve” more appointments.

We can show this is an unlikely explanation in a few different ways. To begin, we can use ordinary least squares (“OLS”) regression analysis,<sup>189</sup> which allows us to control for attorney- or judge-specific factors.<sup>190</sup> Tables 4 and 5 present these results below, which show observations for all attorney–judge pairs in which a judge assigned at least one case to an attorney during our sample period.

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189. We obtain similar results if we use logistic regressions instead for specifications with binary outcome variables. For an explanation of OLS regression analysis, see Valentina Alto, *Understanding the OLS Method for Simple Linear Regression*, MEDIUM (Aug. 17, 2019), <https://towardsdatascience.com/understanding-the-ols-method-for-simple-linear-regression-e0a4e8f692cc> [<https://perma.cc/UWE2-29H5>].

190. We cannot rule out that time-varying, unobservable differences across donor and non-donor cases are driving the differences in case assignment or revenues that we see here. But we doubt this is the case, given the size of these differences and how closely they hew to donation practices, as discussed in more detail below.

TABLE 4: CASES ASSIGNED / REVENUE EARNED FOR DONORS TO ASSIGNING JUDGE VS. NON-DONORS

	# Cases: Appointed by Donee Judge			Revenue: From Cases with Donee Judge		
	(1)	(2)	(3)	(4)	(5)	(6)
Donor	28.79*** (4.05)	28.01*** (6.89)	32.22*** (6.93)	17,089*** (2,436)	14,251*** (3,306)	13,568*** (2,823)
Observations	10,723	10,723	10,723	4,939	4,939	4,939
Adj. R-squared	0.01	0.04	0.28	0.02	0.06	0.39
Judge, Atty Ctrls	NO	YES	NO	NO	YES	NO
Judge, Atty FEs	NO	NO	YES	NO	NO	YES

*Notes:* This table presents OLS regressions for all felony cases with indigent defense appointments in Harris County, Texas, from 2004-2018, at the attorney-judge pair level. The outcome variable in cols. (1)-(3) is total cases assigned by a judge to an attorney; in cols. (4)-(6), it is total revenue earned by an attorney across all cases assigned by a judge. "Donor" is a dummy variable for whether an attorney ever donated to the judge in the pairing. Cols. (2) and (5) include controls for attorney and judge characteristics as specified in the text. Cols. (3) and (6) include both attorney and judge fixed effects. All specifications include a constant variable control. Standard errors are heteroskedastic robust in cols. (1) and (4) and clustered at the judge-level elsewhere. \*\*\* = significant at 1% level.

In Table 4, the key regressor of interest in all columns is "Donor," a dummy variable (such as a 0/1 variable) that = 1 when the attorney was a contributor to the judge and = 0 when the attorney was never a contributor. The outcome variable in columns (1)–(3) is the total number of indigent defense cases assigned by a particular judge to a particular attorney. In columns (4)–(6), the outcome variable is total fees earned by an attorney across all indigent defense cases assigned by a particular judge.<sup>191</sup>

Column (1) presents the most parsimonious specification, with no controls. The coefficient for "Donor" is 28.79, and it is statistically significant at the 1% level. This means that donors on average were assigned over 28 more cases by their donee judges relative to non-donors. Column (4) translates this into dollars, as it presents the same specification but with total revenues as the outcome variable. Here, we can see donors to an assigning judge earn on average about \$17,089 more than non-donor attorneys.

The remaining columns introduce a variety of controls for attorney or judge characteristics. Columns (2) and (5) capture *observable* differences across attorneys and judges, as they include separate controls for the number of years practicing since admission to

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191. Note that we have fewer judge-attorney pairs in these columns because we only have revenue data from TIDC for 2014–2018. *See supra* note 176 and accompanying text. If anything, that suggests our estimates of revenues earned are underestimated, since we only have an estimate of the fees earned by attorneys during those years and cannot measure fees earned prior to 2014. Thus, indigent defense work is likely significantly more profitable than we show here.

the Texas bar for the attorney and the judge;<sup>192</sup> controls for law schools attended by the attorney and the judge;<sup>193</sup> a dummy variable for whether the attorney ever served as a public defender; and a dummy variable for whether the attorney and the judge attended the same law school.<sup>194</sup>

Columns (3) and (6) capture *unobservable*, time-invariant differences across attorneys and judges. They accomplish this by including fixed effects for attorneys (controls that should capture time-invariant attorney-specific behavior) and fixed effects for judges (controls that should capture time-invariant judge-specific behavior).

Notably, controlling for these differences does not change the results in any substantial way. Whether we add controls for observable differences in attorneys and judges, as in columns (2) and (5), or if we add in judge- and attorney-fixed effects, as in columns (3) and (6), the coefficient remains roughly similar in magnitude and maintains its statistical significance.

We now turn to Table 5, identical to Table 4 except that now the regressor of interest is “Total Donated,” which is the total dollar amount that an attorney has ever donated to a judge over time. Column (1) again presents the most parsimonious specification, with no controls. The coefficient in column (1) is 0.064, which is statistically significant at the 1% level. This means that every dollar donated by an attorney to a judge is associated with 0.064 additional cases assigned to that attorney. If we interpret this within a pay-to-play context, then  $\$1/0.064 = \$15.63$  is the price for an attorney to “buy” a single case from a judge.

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192. In addition to proxying for a judge’s legal experience, this variable indirectly captures whether the judge is of a similar age as an attorney. This might matter, for example, if we think that judges and attorneys who are similar in age are more likely to be friends, and that this friendship, rather than campaign donations, is driving the results here.

193. These are “fixed effects” for law school—separate dummy variables added for each separate law school attended by an attorney in our sample. We obtain similar results if we instead include law school ranking as a control.

194. Controlling for the law school tries to capture the effects of attending a specific law school itself, whereas the “same law school” dummy variable might capture a “camaraderie” or social “network effect.” For example, if judges are biased toward attorneys who attended their alma mater, then this dummy variable would capture that effect. The controls for experience might also capture similar social network effects, to the extent that judges and attorneys with similar levels of experience in the legal system are more likely to be connected socially.

TABLE 5: CASES ASSIGNED / REVENUE EARNED FOR EACH DOLLAR  
DONATED TO ASSIGNING JUDGE

	# Cases: Appointed by Donee Judge			Revenue: From Cases with Donee Judge		
	(1)	(2)	(3)	(4)	(5)	(6)
Total Donated	0.064*** (0.019)	0.065*** (0.020)	0.073*** (0.021)	27.95*** (9.08)	28.08*** (7.33)	28.25*** (6.20)
Observations	10,723	10,723	10,723	4,939	4,939	4,939
Adj. R-squared	0.04	0.07	0.32	0.09	0.13	0.45
Judge, Atty Ctrls	NO	YES	NO	NO	YES	NO
Judge, Atty FEs	NO	NO	YES	NO	NO	YES

*Notes:* This table presents OLS regressions for all felony cases with indigent defense appointments in Harris County, Texas, from 2004-2018, at the attorney-judge pair level. The outcome variable in cols. (1)-(3) is total cases assigned by a judge to an attorney; in cols. (4)-(6), it is total revenue earned by an attorney across all cases assigned by a judge. "Total Donated" is the total dollar amount ever donated from an attorney to the judge in the pairing. Cols. (2) and (5) include controls for attorney and judge characteristics as specified in the text. Cols. (3) and (6) include both attorney and judge fixed effects. All specifications include a constant variable control. Standard errors are heteroskedastic robust in cols. (1) and (4) and clustered at the judge-level elsewhere. \*\*\* = significant at 1% level.

Similarly, column (4) presents the same specification but with total revenues as the outcome variable. Here, we can see that each dollar contributed from an attorney to a judge on average results in \$27.95 in fees from that judge. Within a pay-to-play context, this can be interpreted as a return on investment—a \$1 donation by an attorney yields \$27.95 in revenues.

Like Table 4, the addition of attorney- or judge-level controls in columns (2) and (5) or fixed effects in columns (3) and (6) does not substantially impact the results. They remain at approximately the same magnitude and are highly statistically significant. Once again, this suggests that systematic differences between donor and non-donor attorneys, such as differences in their experience or education, are not driving the results here.

*2. Comparisons Within the Donor Class.* Still, one might wonder whether these results can be explained by some difference between donors and non-donors that cannot be easily captured by regression controls. One way we can assess whether such a claim might be driving our results is to focus only on the sample of donors and see whether our results remain. Specifically, we can exploit the fact that a donor typically only contributes to some, but not all, of the judges she appears before. Therefore, if we limit our sample only to attorneys who donated to at least one judge, a natural comparison is to see whether donors received more case assignments from their donee judges relative to judges to whom they did not donate. If so, that would suggest there is something specific in the judge-donor relationship,

rather than something special about the donor herself, that is causing the judge to assign more cases to that attorney.

Once again, graphs can dramatically illustrate the results. Figure 3 below limits our sample only to attorneys who donated to at least one judge during our sample period of 2004–2018. Like Figure 2, the histogram on the top shows the natural log of cases, and the histogram on the bottom shows the natural log of revenues. The white bars again represent attorney–judge pairs in which the attorney donated to that judge. The gray bars now show attorney–judge pairs in which the attorney did not donate to that judge, but where she did donate to some other judge.

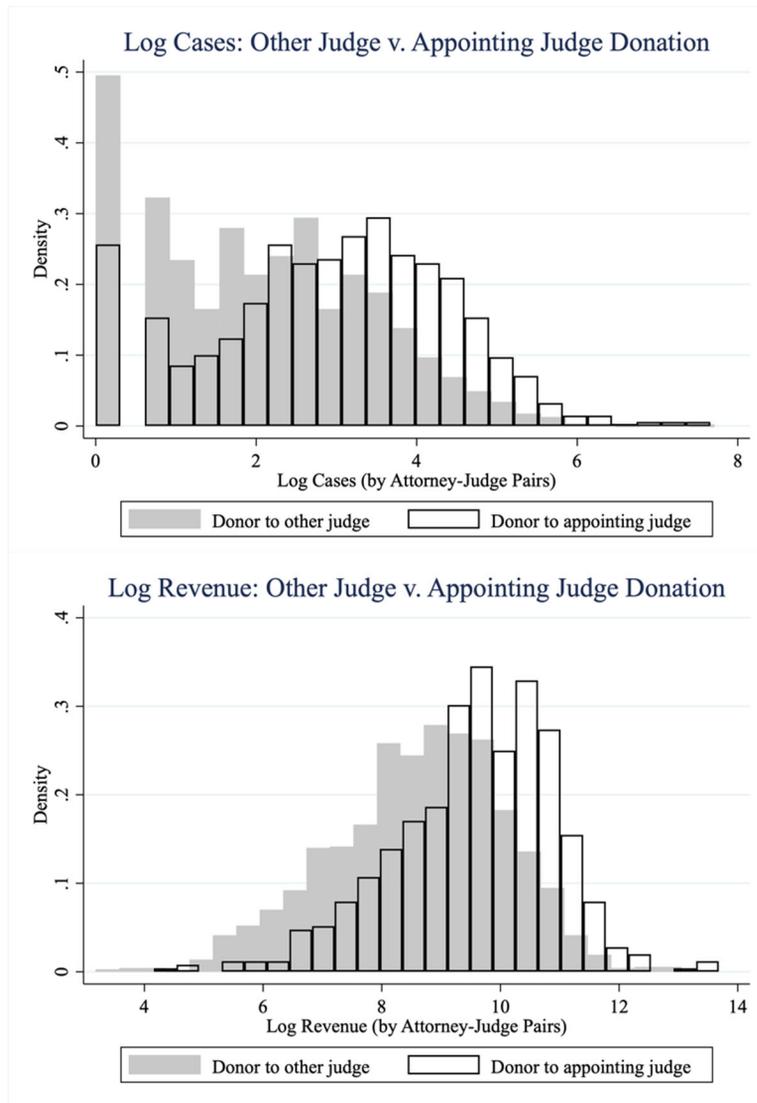
Once again, the white distribution is shifted to the right for both the cases and revenues graphs. In other words, attorneys in the donor class received significantly more cases—and earned significantly more revenue—from their donee judges relative to other judges to whom they did not donate. This implies there is nothing special about donor attorneys themselves earning them additional case assignments. Rather, there is something specific to the donor–judge relationship that is driving that result, since only judges to whom attorneys donated seem to assign those attorneys a disproportionate number of cases.<sup>195</sup>

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195. We can also run the same regression analysis as we did earlier, but this time limited to attorneys who donated to at least one judge. Appendix Tables A.1 and A.2 present this analysis, with Table A.1 presenting the same specifications as Table 4, and Table A.2 presenting the same specifications as Table 5. We can see that all of the regression coefficients remain highly significant and are similar in magnitude as in the previous tables. This once again shows that attorney- or judge-level differences do not seem to be driving our results.

In addition, we can compare attorneys who donated more than one time to a judge (“multiple donors”) with attorneys who never donated or donated just once to the judge. If pay to play is occurring, one might expect that multiple donors would be assigned more cases and earn more revenues as compared to non-donors and single-time donors. This is, in fact, what we find. In Appendix Table A.3, we see that multiple donors are on average assigned between 35.86 and 40.03 more cases, and earn between \$17,361 and \$23,979 more revenue, than non-donors and single-time donors to a judge. Appendix Table A.4 presents similar results when we limit our sample just to attorneys who donated to at least one judge in our sample.

FIGURE 3: DONOR APPOINTMENTS AND REVENUES FROM  
DONEE JUDGES VS. OTHER JUDGES



3. *Donation Timing and “Entry Fees.”* So far, we have shown that, first, donor attorneys are assigned more cases (and earn more revenue) than non-donors and, second, that attorneys who donate receive more cases (and earn more revenue) from their donee judges relative to

other judges to whom they did not donate. Given our controls, these donation patterns cannot be explained by observable differences across attorneys or judges, such as where they attended law school, the ranking of the law school, or the years of practice experience they might have. They also cannot be easily explained by social network arguments, such as an alumni connection to a particular school that both judges and attorneys attended, or similarities in age or years of experience. Moreover, they cannot be explained by unobservable differences across attorneys and judges that remain fixed over time. All of these results are consistent with a system in which pay to play is rampant, as anecdotal evidence suggests.

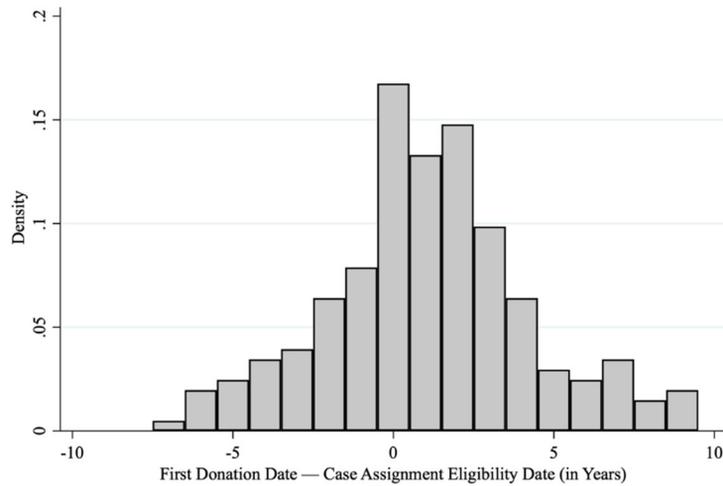
Still, our analysis can go further. Another approach to get more evidence of pay to play is to exploit the timing of donations relative to appointments. A prerequisite for appointment as indigent defense counsel is getting added to a list of eligible attorneys, as noted above. If pay to play is occurring, one might expect donors to give their donations either just before or soon after they become eligible to receive cases. One could view this type of donation as an “entry fee” that attorneys must pay judges to receive appointments.

Because we know when counsel became eligible to be assigned cases, and when they gave their first donation to a judge, we can test whether in fact this is true. Figure 4 below graphically displays our results as a histogram. It tracks the difference in years between when an attorney first donated to a judge and when she first became eligible to be appointed as indigent defense counsel.<sup>196</sup> A negative value means that the attorney donated prior to becoming eligible to receive cases; a positive value means that she donated after gaining eligibility. A “0” value means the attorney donated in precisely the same year she became eligible to receive cases. If an attorney donated in an election year, then a value of 0, 1, 2, or 3 means that the attorney received her first appointment from that judge in the four-year term following that donation.

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196. In Figure 4, we limit our sample of attorney–judge pairs to judges who were elected in 2008 or later and attorneys who became eligible for appointment in 2008 or later. This prevents data censoring issues that might skew the graph, since we do not have donation data prior to 2004, and we do not know the exact year when attorneys who were listed as eligible in 2005 first gained their eligibility. The same general trends typically hold, however, even if we limit our sample in other ways.

FIGURE 4: FIRST DONATION RELATIVE TO CASE ASSIGNMENT ELIGIBILITY



If donations and appointments were completely unrelated, one might expect a uniform distribution—that is, a relatively flat graph from left to right. But that is clearly not true here. This graph peaks at 0, and the majority of the distribution is just to the right. This means most attorneys who donated to a judge first donated soon after they became eligible to receive appointments from that judge. In fact, in over half of all attorney–judge pairs in which the attorney donated to the judge (54.7%), the first donation to the judge occurred between zero and three years following the year the attorney became eligible to receive indigent defense counsel cases.<sup>197</sup>

If we also include donations that occurred in the year prior to eligibility—a plausible time to donate if one wants to pay to play, since an attorney must be voted in by a majority of judges before she is placed on the eligible list<sup>198</sup>—then the percentage of relevant attorney–judge pairs jumps to 62.6%. These facts are again consistent with a pay-to-play system, where newly eligible or soon-to-be-eligible attorneys pay entry fees they believe will persuade judges to assign them cases.

4. *Case Outcomes.* The differences in revenue and case assignment might be less troubling if donors consistently achieve better

197. This distribution is inconsistent with an alternate story, in which lawyers get to know judges by practicing before them and then donate to the judges they think are good.

198. See *supra* note 157.

outcomes for their clients relative to non-donors. Indeed, this story is not completely implausible—if pay to play is occurring, then perhaps the attorneys who pay are buying better results for their clients.<sup>199</sup>

The data, however, provide no evidence to suggest this is true. Table 6 below shows summary statistics that compare whether donors and non-donors achieve various positive outcomes for their clients. We define an outcome as “good” (Good outcome = 1) if a charge<sup>200</sup> is dismissed or reduced,<sup>201</sup> or the defendant is acquitted; and an outcome as “not good” (Good outcome = 0) if the defendant is convicted or pleads guilty or no contest.<sup>202</sup> By this metric, non-donor attorneys do slightly better than donors (37.45% versus 37.01%). Defendants represented by non-donors are also less likely to end up in the Texas Department of Corrections (16.53% for non-donors versus 17.97% for donors) and receive shorter prison or jail sentences on average (663.24 and 767.74 days for non-donors and donors, respectively).

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199. *See infra* notes 214–15 and accompanying text (noting an accusation from Oklahoma district attorney that a judge was partial toward defense attorneys who donated to her campaign).

200. We conduct our analysis here at the charge level, since whether a defendant is convicted or acquitted and what the sentence he receives is determined at that level. Nonetheless, our results remain similar if we aggregate up to the case level instead.

201. We can determine whether charges are reduced by comparing the offense level in the complaint (for example, first-degree felony or second-degree felony) and the offense level when the case was disposed.

202. Some outcomes are ambiguous whether they are good or bad; we exclude those charges when defining this variable. For example, it is ambiguous whether an outcome is good when the case is dismissed because the defendant died or when the defendant was convicted on another charge.

TABLE 6: DONORS VS. NON-DONORS—CASE OUTCOMES (2005–2018)

	All	Donor	Non-Donor
<b>Number of Attorneys<sup>a</sup></b>	772	198 (25.65%)	574 (74.35%)
<b>Cases Appointed: Any Donation<sup>a</sup></b>	—	152,200 (52.37%)	138,433 (47.63%)
<b>Cases Appointed: Donate Appt. Judge<sup>b</sup></b>	—	58,588 (20.16%)	232,045 (79.84%)
<b>Average Case Pendency (days)<sup>b</sup></b>	105.77	108.77	105.02
<b>Outcomes<sup>b, c</sup></b>			
Good Outcome <sup>d</sup>	37.36%	37.01%	37.45%
Texas Dept. of Corrections	16.82%	17.97%	16.53%
Harris County Jail	28.02%	25.52%	28.66%
State Jail	19.64%	19.69%	19.63%
Mean Prison/Jail Time (days)	684.11	767.74	663.24

<sup>a</sup> “Donor” = 1 if attorney donated at least once to some judge during sample period

<sup>b</sup> “Donor” = 1 if attorney donated at least once to assigning judge during sample period

<sup>c</sup> All outcomes defined at the individual charge level

<sup>d</sup> “Good” = 1 if charges dismissed or reduced, or defendant acquitted or found not guilty; = 0 if defendant found or pled guilty or no contest

A reasonable concern is that these slight differences in outcomes might be driven by differences in case or defendant characteristics. Based on what we can observe, however, this does not seem to be true either. We can control for various case and defendant characteristics through an OLS regression analysis, as presented in Table 7 below.

TABLE 7: CASE OUTCOMES FOR DONOR VS. NON-DONOR ATTORNEYS

	Good Outcome		Sentenced TDC		Jail/Prison Term	
	(1)	(2)	(3)	(4)	(5)	(6)
Donor Somewhere	-0.44*** (0.15)	-0.05 (0.41)	0.75*** (0.11)	0.57** (0.25)	33.71*** (4.55)	18.32** (7.74)
Public Defender	8.91*** (0.50)	6.31*** (0.65)	-2.12*** (0.37)	-1.25* (0.64)	40.16** (18.16)	8.94 (24.94)
Def. Female	-	1.79*** (0.24)	-	-5.70*** (0.20)	-	-110.67*** (4.45)
Def. White	-	-0.21 (0.16)	-	0.39*** (0.13)	-	-34.95*** (6.08)
Def. Age	-	-0.00 (0.01)	-	0.19*** (0.01)	-	6.56*** (0.29)
Constant	117.07*** (2.26)	119.14*** (2.48)	-4.97*** (0.46)	-13.95*** (0.96)	-14.47 (14.76)	-424.38*** (41.31)
Observations	325,791	325,712	325,871	325,792	211,112	211,056
Adj. R-squared	0.22	0.23	0.24	0.25	0.44	0.45
Charge FE	YES	YES	YES	YES	YES	YES
Judge FEs	NO	YES	NO	YES	NO	YES

*Notes:* This table presents OLS regressions of case outcomes on attorney, defendant, and case characteristics. "Donor Somewhere" is a dummy variable for whether an attorney ever donated to some judge in the sample. "Good Outcome" = 1 if case is dismissed, defendant is acquitted, or charges are reduced; = 0 if defendant is convicted or pleads guilty or no contest. "Sentenced TDC" = 1 if defendant received a prison sentence in the Texas Department of Corrections, = 0 otherwise. Coefficients for "Good Outcome" and "Sentenced TDC" are inflated by 100 to put in percentage point terms. "Any Jail/Prison Term" = max sentence across TDC, Harris County Jail or state jail. Standard errors are heteroskedastic robust in odd-numbered columns and clustered at the judge-level in even-numbered columns. \*\*\* = significant at 1% level, \*\* = significant at 5% level, \* = significant at 10% level.

The outcome variable in columns (1)–(2) is a dummy variable for whether the attorney achieves a “good” outcome as defined earlier. In columns (3)–(4), the outcome is a dummy variable for whether the defendant receives a term of imprisonment in the Texas Department of Corrections, which is typically where most substantial prison sentences are served. And in columns (5)–(6), the outcome variable is the sentence of jail or imprisonment received for a charge. Odd-numbered columns include controls for whether a defense attorney is a public defender and for the type of crime charged,<sup>203</sup> while even-numbered columns also include dummy variables for whether a

203. Because outcomes depend so heavily on the type of crime that is charged, we include as a control the type of offense charged even in our base specifications. We can distinguish between 631 different charged crimes, often split quite finely. For example, within the narrow category of “trademark counterfeiting,” we can distinguish between five different classes based on the amount of the offense.

defendant was White or female, a control for the defendant's age, and fixed effects for the judge in the case.

We can see that generally speaking, donor attorneys perform worse than non-donor attorneys. If anything, donor attorneys appear between 0.05 and 0.44 percentage points less likely to obtain a good outcome, though the results are not always statistically significant.<sup>204</sup> Donors are between 0.57 and 0.75 percentage points more likely to have a client who is sentenced to a term in the Texas Department of Corrections. And defendants represented by donor attorneys receive jail or prison sentences that are between 18.32 and 33.71 days longer than defendants represented by non-donor attorneys.

Of course, these results should be taken with a grain of salt. It is possible that unobservable differences across cases are driving the slightly worse outcomes we see for donor attorneys. Nonetheless, based on this evidence, it would be hard to conclude that the opposite holds true—that donor attorneys are in fact doing significantly better on the whole than their non-donor counterparts. If anything, donors appear to be underachieving for their clients relative to non-donors. This is what we should probably expect, given the significant additional caseload that donors choose to take on.<sup>205</sup>

#### IV. A NATIONWIDE PHENOMENON? THE POTENTIAL SCOPE OF JUDICIAL PAY TO PLAY

As we have seen in Harris County, assigned counsel and some contract attorneys have financial incentives to amass large numbers of indigent defense cases to maximize their revenues. A bigger question is whether this sort of thing could happen elsewhere, or in other contexts. Put differently, might judicial pay to play be a nationwide problem?

Although a definitive answer to this question requires more empirical analysis, qualitative evidence suggests the problem might be pervasive. To begin, there have been similar reports of pay to play in other counties across Texas. For example, in Bexar County—Texas's

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204. Since about 37% of all defendants receive a good outcome, this translates into between about 0.14% to 1.19% difference between donors and non-donors.

205. One possible counterargument is that since the outcome differential is relatively small between donors and non-donors, perhaps donors would actually outperform non-donors if they were not assigned so many more cases. Even if this is true, however, and donor attorneys are better in this sense, the current system in which donors receive a disproportionate number of cases is likely suboptimal.

fourth most populous county with nearly two million people<sup>206</sup>—a recent editorial decried the phenomenon of attorneys contributing to judges handing out appointments, calling it “a dynamic that raises inherent questions of fairness in the justice system and undermines public trust.”<sup>207</sup>

Campaign finance is similarly linked to a dysfunctional indigent defense system in Travis County, home to Austin, the state’s capital.<sup>208</sup> When a Travis County judge was asked how a lawyer she appointed to over four hundred cases in a year could possibly give his clients a full defense, the judge replied, “Lawyers have a personal responsibility. They know what they can handle. Do we really need to tell a lawyer, ‘Don’t do that’?”<sup>209</sup>

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206. See TEX. DEMOGRAPHIC CTR. AT THE UNIV. OF TEX. AT SAN ANTONIO, ESTIMATES OF THE TOTAL POPULATIONS OF COUNTIES AND PLACES IN TEXAS FOR JULY 1, 2018 AND JANUARY 1, 2019, at 6 tbl.1 (2019), [https://demographics.texas.gov/Resources/TPEPP/Estimates/2018/2018\\_txpopest\\_county.pdf](https://demographics.texas.gov/Resources/TPEPP/Estimates/2018/2018_txpopest_county.pdf) [<https://perma.cc/KP2Y-C9W9>].

207. *Attorney Contributions to Judges Taints the System*, SAN ANTONIO EXPRESS-NEWS ED. BD. (Nov. 10, 2018, 12:00 AM), <https://www.mysanantonio.com/opinion/editorials/article/Attorney-contributions-to-judges-taints-the-system-13379208.php> [<https://perma.cc/9UCF-9FSA>].

208. See Satija, *Judicial Conflicts of Interest*, *supra* note 162.

209. *Id.*; see also Andrew Weber, *Travis County’s Public Defender Office Is Officially Funded*, AUSTIN MONITOR (Aug. 30, 2019), <https://www.austinmonitor.com/stories/2019/08/travis-countys-public-defender-office-is-officially-funded> [<https://perma.cc/F5AD-6ND9>] (discussing the efforts to fund a public defender office in Travis County). In May 2019, Travis County applied for a grant to create a public defender office. Satija, *Judicial Conflicts of Interest*, *supra* note 162. That grant was approved on August 29, 2019. Weber, *supra*.

More generally, Texas’s indigent defense system has been subject to large-scale critiques for decades. In 2000, the nonprofit Texas Appleseed undertook a statewide survey on indigent defense practices. Its final report, released in December 2000, contained 28 findings about Texas’s indigent defense system for non-capital felonies and misdemeanors at the time. The findings included: a “complete absence of uniformity in standards and quality of representation among the indigent defense systems” in the Texas counties surveyed by Appleseed; that “uncontrolled discretion given to judges over attorney selection and compensation . . . creates the potential for conflicts of interest”; and that costs per capita for indigent defense were approximately \$4.65, making Texas near the bottom of all 50 states for indigent defense funding. TEX. APPLESEED FAIR DEF. PROJECT, THE FAIR DEFENSE REPORT 43–51 (2000) [hereinafter TEX. APPLESEED REPORT], <https://www.texasappleseed.org/sites/default/files/184-FairDefenseAct-AppleseedAnalysisReport.pdf> [<https://perma.cc/Z48Z-WHYM>].

Following the issuance of Appleseed’s report on indigent defense in December 2000, the Texas Legislature passed the Fair Defense Act in 2001, which required state judges in all Texas counties to adopt written procedures for delivery of indigent defense services in a timely and fair manner. Fair Defense Act, sec. 6, 2001 Tex. Gen. Laws 1800, 1803 (codified as amended at TEX. CODE CRIM. PROC. ANN. art. 26.04 (West 2019)). This legislation created a state body to administer policies and funding across the state, the Texas Task Force on Indigent Defense, renamed the Texas Indigent Defense Commission in 2011. FABELO ET AL., IMPROVING INDIGENT DEFENSE, *supra* note 98, at 10.

Moreover, it is unlikely that judicial pay to play is simply a Texas phenomenon. Other states have become increasingly aware that campaign finance might affect their trial courts' decisionmaking.<sup>210</sup> In Oklahoma, just across the Red River from Texas, a controversy has emerged over attorneys donating to the civil trial court judges they practice before, with one review showing that more than half of the donations to district judge candidates in 2018 came from thousands of individual attorneys.<sup>211</sup> Claiming the system puts judicial candidates in a "weird position," Oklahoma defense attorney and 2018 district judicial candidate Misty Fields went so far as to send a letter to attorneys in the area "asking for their vote, but not 'for public support of any kind.'"<sup>212</sup> Her letter notwithstanding, Fields ultimately ended up accepting donations from attorneys, claiming it was a necessary part of the campaign:

I would be remiss to say money doesn't matter . . . . You can only do so much with free social media and you can only knock on so many [doors]. It's a sad part of it, but you need some money if you want to blanket an area with signs or newspaper ads.<sup>213</sup>

A recent controversy between a prosecutor and a district court judge has exposed how Oklahoma's criminal trial judges might be at risk as well. In September 2019, prosecutor David Prater publicly requested that District Judge Kendra Coleman recuse herself for failing to disclose her campaign donors, claiming that Coleman repeatedly showed favoritism toward donor attorneys and their clients

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210. Prior scholarly analysis of the impact of campaign finance on judicial decisionmaking has focused almost exclusively on the state supreme court level. *See supra* note 28 and accompanying text. Sue Bell Cobb, former chief justice of the Alabama Supreme Court, lamented the role campaign finance played in her election to the bench, admitting "those of us seeking judicial office sometimes find ourselves doing things that feel awfully unsavory." Sue Bell Cobb, *I Was Alabama's Top Judge. I'm Ashamed by What I Had To Do to Get There*, POLITICO MAG. (Mar.–Apr. 2015), <https://www.politico.com/magazine/story/2015/03/judicial-elections-fundraising-115503> [<https://perma.cc/WJ5T-QMJP>]. "Donors want clarity, certainty even, that the judicial candidates they support view the world as they do and will rule accordingly . . . . They want to know that the investments they make by donating money to a candidate will yield favorable results." *Id.*

211. Trevor Brown, *Attorneys Help Bankroll Campaigns of Judges Who Hear Their Cases*, OKLA. WATCH (Oct. 8, 2018), <https://oklahomawatch.org/2018/10/08/attorneys-help-bankroll-campaigns-of-judges-who-hear-their-cases> [<https://perma.cc/5EZG-PJPP>].

212. *Id.*

213. *Id.* Fields ultimately lost her district court election to Shawn S. Taylor, who received 54.2% of the vote compared to Fields' 45.8%. OKLA. STATE ELECTION BD., OFFICIAL RESULTS-GENERAL ELECTION 373–74 (2018), [https://www.ok.gov/elections/support/20181106\\_cnty.pdf](https://www.ok.gov/elections/support/20181106_cnty.pdf) [<https://perma.cc/2S99-TXLS>].

in her court.<sup>214</sup> Highlighting the need for public trust in the courts, Prater condemned Coleman's lack of transparency: "For each day this Court sits in judgment of parties appearing before it, no one—neither the parties, their counsel, nor the public—can be assured that the decisions being rendered have not been influenced by campaign contributions or other circumstances that this Court is actively endeavoring to conceal."<sup>215</sup>

Despite such stories, many Oklahoman attorneys and judges remain unconvinced that the system needs to change. For example, George Gibbs, an attorney who donated to a judge before whom he had an open civil case, notes, "Our state judges are more impartial, have better temperaments and are more fair than federal judges . . . . No judge is going to risk their career, their standing and their reputation over a donation."<sup>216</sup>

Michigan also appears susceptible to links between campaign finance and trial court decisionmaking. A 2016 report on Michigan's indigent defense system found that court-appointed attorneys do very little work on their cases, with records indicating that in nearly a quarter of criminal cases in a three-county area, an indigent criminal defendant met their attorney for the first time at their initial court appearance.<sup>217</sup> The same report also found that court-appointed attorneys donated thousands of dollars to the campaigns of circuit court judges.<sup>218</sup> David Carroll, executive director of the Sixth Amendment Center, describes how Michigan's system impacts indigent criminal defendants: "[Indigent defendants] may get a lawyer in name only, because that person has so many cases or has financial conflicts of interest. It's as if you're going into court with no lawyer at all."<sup>219</sup>

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214. Nolan Clay, *DA Says Judge Concealed Donors, Should Step Down from All Her Cases*, OKLAHOMAN (Sept. 5, 2019, 1:04 AM), <https://oklahoman.com/article/5640461/da-says-judge-concealed-donors-should-step-down-from-all-his-cases?> [<https://perma.cc/4T4N-W6RD>].

215. *Id.*

216. Brown, *supra* note 211.

217. Justin A. Hinkley & Matt Mencarini, *Court-Appointed Attorneys Paid Little, Do Little, Records Show*, LANSING STATE J. (Nov. 4, 2016, 9:02 AM), <https://www.lansingstatejournal.com/story/news/local/watchdog/2016/11/03/court-appointed-attorneys-paid-little-do-little-records-show/91846874> [<https://perma.cc/3MJM-332A>].

218. *Id.*

219. Max Johnston, *Trials and Tribulations of Court-Appointed Attorneys in Michigan*, INTERLOCHEN PUB. RADIO (Sept. 12, 2019), <https://www.interlochenpublicradio.org/post/trials-and-tribulations-court-appointed-attorneys-michigan> [<https://perma.cc/8GG2-GXEZ>]. Former

These states are not the only ones struggling to manage the impact of campaign finance on their trial court systems. In 2004, the ABA Standing Committee on Legal Aid and Indigent Defendants created a comprehensive report on the state of the right to counsel to commemorate *Gideon*'s fortieth anniversary.<sup>220</sup> Relying on the public testimony of attorneys from around the country, the Committee found, "In many localities, the selection and payment of counsel is still under the control of judges or other elected officials instead of an independent authority as recommended by national standards."<sup>221</sup> It continued:

Accordingly, lawyers must depend on judges to approve their compensation claims, as well as requests for expert or investigative services. Attorneys may be removed from court-appointed lists if they apply for fees considered by judges to be too high, creating a disincentive to spend adequate time on a case. *In some places, elected judges award court appointments as favors to attorneys who support their campaigns for re-election.*<sup>222</sup>

There is no reason to believe the situation has improved since then. In late 2014, the ABA identified thirty-nine states with judicial elections, either partisan, nonpartisan, or retention.<sup>223</sup> Thirty of those states ban judges from personally soliciting funds for campaigns,

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public defender Eve Primus, who studies Michigan's indigent defense issues, also emphasizes how poor defendants bear the brunt of Michigan's dysfunctional system:

It isn't the rich white people who are being dragged through this system . . . . If you cared about "Brown v. Board of Education" and if you cared about the way we treated minorities in this society and you thought separate but equal was a bad thing, you should care about the criminal justice system because that's where separate and not equal seems to be the pervasive concept.

Hinkley & Mencarini, *supra* note 217.

220. *GIDEON'S BROKEN PROMISE*, *supra* note 130, at 1.

221. *Id.* at 39.

222. *Id.* (emphasis added)

223. Brief for The American Bar Association as Amicus Curiae Supporting Respondent at App. 1A–20A, *Williams-Yulee v. Fla. Bar*, 575 U.S. 433 (2015) (No. 13-1499) [hereinafter ABA Brief] (writing in support of a suit against the Florida Bar, whose ban on personal solicitation by judicial candidates was challenged as violating the First Amendment).

though many of them allow campaign committees to solicit on their behalf,<sup>224</sup> and most allow judges to accept unsolicited funds.<sup>225</sup>

Moreover, many other states with elected trial judges permit judicial candidates to solicit campaign funds or have bans with significant loopholes that allow candidates to indirectly receive—and know they have received—donations from attorneys who appear before them. These states include Alabama,<sup>226</sup> California,<sup>227</sup> Georgia,<sup>228</sup>

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224. *Id.* at 5. For example, Alaska judges stand for retention election and are prohibited from personal solicitation, though candidates may create campaign contribution committees, which “are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers.” *See id.* at App. 2A–3A (citing ALASKA CODE OF JUD. CONDUCT 5(C)(3)). Some states indicate that judges should not be informed who contributed to the campaign committee. *See, e.g.*, COLO. CODE OF JUD. CONDUCT 4.3(A)(5); IDAHO CODE OF JUD. ETHICS 4.4(C); MINN. CODE OF JUD. CONDUCT 4.4(B)(3); N.M. CODE OF JUD. CONDUCT 21-402(E); *cf.* LA. CODE OF JUD. CONDUCT 7(A)(6), cmt. 2 (“A judge or judicial candidate is prohibited from personally soliciting or personally accepting campaign contributions, but is not prohibited from knowing the identities of his or her campaign contributors.”).

225. *See* DEBORAH GOLDBERG & SAMANTHA SANCHEZ, THE NEW POLITICS OF JUDICIAL ELECTIONS 2002: HOW THE THREAT TO FAIR AND IMPARTIAL COURTS SPREAD TO MORE STATES IN 2002, at 23 n.27 (2004), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_NewPoliticsReport2002.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_NewPoliticsReport2002.pdf) [<https://perma.cc/P2FB-Y93A>] (noting that in virtually every state, judicial candidates are not allowed to solicit contributions directly and must rely on campaign committees or unsolicited donations).

226. Alabama judges are elected and “strongly discouraged from personally soliciting campaign contributions.” ALA. CANONS OF JUD. ETHICS 7(B)(4)(a). The Canons highly recommend that “a candidate establish committees of responsible persons to solicit and accept campaign contributions, to manage the expenditure of funds for the candidate’s campaign, and to obtain public statements of support for his or her candidacy,” and note that “[s]uch committees may solicit and accept campaign contributions and public support from lawyers.” *Id.*

227. Cal. Canon 5(b)(4) provides:

In judicial elections, judges may solicit campaign contributions or endorsements for their own campaigns or for other judges and attorneys who are candidates for judicial office. *Judges are permitted to solicit such contributions and endorsements from anyone, including attorneys and other judges*, except that a judge shall not solicit campaign contributions or endorsements from California state court commissioners, referees, court-appointed arbitrators, hearing officers, and retired judges serving in the Temporary Assigned Judges Program, or from California state court personnel. In soliciting campaign contributions or endorsements, a judge shall not use the prestige of judicial office in a manner that would reasonably be perceived as coercive.

CAL. CODE OF JUD. ETHICS 5(B)(4) (emphasis added).

228. “Georgia judges are elected in non-partisan elections [and] may personally solicit campaign contributions and publicly stated support.” ABA Brief, *supra* note 223, at app. 6A. *But see* Weaver v. Bonner, 309 F.3d 1312, 1322 (11th Cir. 2002) (finding Georgia’s canon is not narrowly tailored to serve Georgia’s compelling interest in judicial impartiality, as the canon prohibits judicial candidates from soliciting campaign contributions while allowing the candidate’s election committee to do so).

Kansas,<sup>229</sup> Kentucky,<sup>230</sup> Maryland,<sup>231</sup> Missouri,<sup>232</sup> Montana,<sup>233</sup> Nevada,<sup>234</sup> North Carolina,<sup>235</sup> and Ohio.<sup>236</sup> Each of these states also relies, at least to some extent, on assigned counsel systems.<sup>237</sup> Hence,

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229. A judicial district may choose to have elected trial judges, and judges may solicit campaign contributions. *See* ABA Brief, *supra* note 223, at app. 8A (noting Kansas's prohibition on personally soliciting campaign contributions was struck down in *Yost v. Stout*, No. 06-4122-JAR, 2008 WL 8906379 (D. Kan. Nov. 16, 2008)).

230. *See* ABA Brief, *supra* note 223, at app. 8A (citing, with approval, *Carey v. Wolnitzek*, 614 F.3d 189 (6th Cir. 2010), which found Kentucky's solicitation clause unconstitutional).

231. *See* ABA Brief, *supra* note 223, at app. 9A ("Trial court judges are elected in non-partisan elections. The Maryland Code of Judicial Conduct does not prohibit candidates from personally soliciting or accepting contributions.").

232. Missouri Rule 2-4.2(B) states "candidate[s] shall not solicit in person campaign funds from persons likely to appear before the judge. [They] may make a written campaign solicitation for campaign funds of any person or group, including any person or group likely to appear before the judge." MO. SUP. CT. R. 2-4.2(B); *see also* ABA Brief, *supra* note 223, at app. 11A.

233. Montana judges are elected in non-partisan elections and can personally solicit campaign contributions. *See* ABA Brief, *supra* note 223, at app. 12A.

234. NEV. CODE OF JUD. CONDUCT 4.2(B)(4) (permits judges who are opposed in elections, which are non-partisan, to personally solicit and accept campaign contributions); *see also* ABA Brief, *supra* note 223, at app. 12A.

235. Judges are elected in publicly funded, non-partisan elections in North Carolina. Canon 7(B)(4) states a judge or judicial candidate in North Carolina may "personally solicit campaign funds and request public support from anyone for his/her own campaign or, alternatively, and in addition thereto, authorize or establish committees of responsible persons to secure and manage the solicitation and expenditure of campaign funds." N.C. CODE OF JUD. CONDUCT 7(B)(4); *see also* ABA Brief, *supra* note 223, at app. 14A.

236. The Ohio Code of Judicial Conduct prohibits candidates and judges from personally soliciting campaign contributions in Rule 4.4(A). OHIO CODE OF JUD. CONDUCT 4.4(A). But a judicial candidate may make "a general request for campaign contributions when speaking to an audience of twenty or more individuals;" "sign letters soliciting campaign contributions if the letters are for distribution by the judicial candidate's campaign committee and the letters direct contributions to be sent to the campaign committee and not to the judicial candidate;" or "make a general request for campaign contributions via an electronic communication that is in text format if contributions are directed to be sent to the campaign committee and not to the judicial candidate." *Id.* (emphasis omitted); *see also* ABA Brief, *supra* note 223, at app.15A. The Ohio Supreme Court recently amended Superintendence Rule 8, which states in part:

For appointments frequently made in the court or division, a procedure for selecting appointees from a list maintained by the court or division of persons pre-qualified to serve in the capacity designated by the court or division . . . . To ensure an equitable distribution of appointments, the court or division may utilize a rotary system from a graduated list that pairs the seriousness and complexity of the case with the qualifications and experience of the person to be appointed.

OHIO SUP. CT. R. § 8(B)(2)(a).

237. For instance, consider California. *See, e.g., California: Quick Guide, GIDEON AT 50*, <http://gideonat50.org/in-your-state/california/#state-independence> [<https://perma.cc/9AUY-4NVC>] (explaining California provides very little funding and oversight over right to counsel services at both the trial and appellate level, stating that most "rural counties provide services through flat-fee contracts with private firms or with individual attorneys for primary and for conflict services.

when considering this list of states in addition to Texas, Oklahoma, and Michigan,<sup>238</sup> it is apparent that campaign finance might increase the gap between attorney and defendant interests in judicial systems across multiple states, collectively home to tens of millions of Americans.

#### V. THE PERVASIVENESS OF THE INCENTIVE GAP: CAMPAIGN FINANCE REGULATION AND OTHER REFORMS

The likely prevalence of pay to play, as revealed by our quantitative and qualitative analysis, is troubling. In part, this is because a system in which attorneys buy cases from judges runs counter to common notions of legal ethics and justice. And in part, it is because donor attorneys might underperform for their clients relative to non-donors, as our analysis suggests.

But perhaps most discomfoting is that pay to play lays bare the core dysfunction in the right to counsel: many attorneys assigned to represent indigent defendants do not share their clients' interests. More concisely, pay to play is just a symptom of the incentive gap.

The centrality and pervasiveness of the incentive gap suggests that minor changes to campaign finance laws or case assignment rules will not eliminate pay to play. And even more importantly, such minimal reforms are unlikely to significantly improve the quality of representation for indigent defendants. This is because reforms that solely target pay to play do not necessarily reduce assigned counsel's core incentives to seek out as many cases as possible or to only work minimally on each case they are assigned. So long as this incentive gap remains, attorneys and judges are likely to find ways around such reforms.

These problems become apparent when we look more closely at some plausible reforms that target pay to play. For example, consider a reform prohibiting donee judges from appointing their donors as

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There is no oversight board for any trial-level system in any California county. With a few notable exceptions, most right to counsel systems are overseen by the county's legislative board").

238. Interestingly, both Oklahoma and Michigan have judicial ethics codes prohibiting judges from personally soliciting campaign contributions. *Compare* OKLA. CODE OF JUD. CONDUCT 4.1(A)(8) (stating that a candidate shall not "personally solicit or accept campaign contributions other than through a campaign committee"), *and* MICH. CODE OF JUD. CONDUCT 7(B)(2)(a) ("A candidate should not personally solicit or accept campaign funds."), *with* TEX. CODE OF JUD. CONDUCT 4(D)(1) (permitting judges to solicit "funds for appropriate campaign or officeholder expenses as permitted by state law"). That media reports from each state suggest that judges, in fact, do receive campaign contributions from attorneys who practice in their court calls into question the efficacy of such bans in preventing pay to play. *See supra* notes 210–19.

counsel<sup>239</sup> for at least some time period following a contribution—perhaps until an intervening election cycle has passed, even permanently. Such a rule might reduce the incidence of pay to play, as judicial donations would now cost attorneys potential revenue in future indigent defense cases.<sup>240</sup> But it would not address situations in which attorney appointments precede donations—something we observe in our data and which might become more prevalent if such a reform is enacted. Thus, attorneys and judges might still conduct pay to play by tacitly agreeing to transact in cases first and in donations later.

More substantial reforms could further reduce judges' discretion to assign indigent defense cases. Mandatory rotation policies, in which judges are supposed to assign attorneys from a rotating wheel, are examples of such an approach. Putting aside whether such a system is optimal or best serves defendants' interests—as there is no reason to believe that an even split of cases across all eligible attorneys is necessarily ideal—our empirical results suggest such systems are honored more in the breach. Harris County criminal court judges are supposed to follow a wheel assignment system, but as we have seen, they often distribute cases highly unevenly among attorneys eligible for appointments in their courts.

One might go further and remove the case assignment power from judges altogether. Some jurisdictions already have such managed assigned counsel systems, which place the assignment power with an independent commission or entity.<sup>241</sup> But these systems face numerous political<sup>242</sup> and practical obstacles that can limit their effectiveness in

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239. Alternatively, this same rule could be configured from the perspective of the assigned attorney: ethics rules could prohibit him from seeking or accepting a case assignment from a judge to whom he has donated.

240. Relatedly, it would have the positive secondary effect of disincentivizing attorneys from donating to a judge before whom they might want to practice in the future.

241. See *supra* notes 101–02 and accompanying text.

242. Texas provides a case in point. In 1999, the Texas Legislature passed a bill to create a statewide managed assigned counsel system, but the bill was subsequently vetoed by then-Governor George W. Bush. Satija, *Judicial Conflicts of Interest*, *supra* note 162. He stated in his veto proclamation:

Senate Bill No. 247 proposes a drastic change in the way indigent criminal defendants are assigned counsel. While well-intentioned, the effect of the bill is likely to be neither better representation for indigents nor a more efficient administration of justice. The bill inappropriately takes appointment authority away from judges, who are better able to assess the quality of legal representation, and gives it to county officials. The bill creates the potential for counties to set up a new layer of bureaucracy that could result in increased backlogs and decreased court efficiency.

Official Memorandum from the State of Tex., Off. of the Governor George W. Bush, Veto of S. B. 247 (June 20, 1999), <https://lrl.texas.gov/scanned/vetoes/76/sb247.pdf> [<https://perma.cc/4AKY->

practice. For example, Travis County created an independent agency to oversee indigent defense in 2015. But even with this reform, cases are still assigned in a grossly uneven manner.<sup>243</sup>

Moreover, even if trial judges are divested of the power to assign indigent defense cases, they could find other ways to reward their donors. For example, if a judge's approval is required to fulfill attorney requests for out-of-court case preparation expenses and expert opinions—as is often the case—then a judge would still have the opportunity to be more generous with her donors than with non-donors in granting such requests.

Instead of focusing on attorney appointments, policymakers might instead target pay to play through campaign finance reform. For example, policymakers could prohibit judges from personally soliciting donations from practicing attorneys. Such an approach would likely pass constitutional muster following the Supreme Court's recent 5–4 decision in *Williams-Yulee v. Florida Bar*,<sup>244</sup> in which the Court applied strict scrutiny<sup>245</sup> and upheld a Florida ethics rule banning judicial candidates from personally soliciting any campaign funds.<sup>246</sup> The Court found that the state had a compelling governmental interest “in preserving public confidence in the integrity of the judiciary”<sup>247</sup> and that the solicitation ban was narrowly tailored toward that interest.<sup>248</sup> A restriction that merely prohibited judicial candidates from soliciting funds from practicing attorneys would be narrower in scope than the Florida ban<sup>249</sup> and would thus be presumptively constitutional.

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6WES]. Bush's statement points out some of the political challenges of taking appointment power away from state judges. *See id.*

243. *See* Neena Satija, *Travis County Overhauled Legal Representation for the Poor, But Lawyers Are Still Overwhelmed*, TEX. TRIB. (Apr. 26, 2018, 12:00 AM), <https://www.texastribune.org/2018/04/26/travis-county-overhauled-legal-representation-poor-lawyers-are-still-o> [<https://perma.cc/XJW9-KFKS>] (noting that one attorney was assigned 349 felony and 434 misdemeanor cases in 2017).

244. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433 (2015).

245. Justices Ruth Bader Ginsburg and Stephen Breyer argued that a less exacting standard should apply for judicial elections. *See id.* at 457. (Ginsburg, J., concurring) (citing *Republican Party of Minn. v. White*, 536 U.S. 765, 803 (2002)). The dissent agreed with the majority that strict scrutiny was the appropriate standard of review. *See id.* at 1685 (Alito, J., dissenting).

246. *Id.* at 1662 (majority opinion).

247. *Id.* at 1666–68.

248. In so finding, the Court relied in part on the fact that the Florida law allowed candidates to set up campaign committees to solicit donations. *See id.* at 1660.

249. Texas does not appear to have any such ban:

A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of the judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with

Yet such a ban would not necessarily eliminate pay to play. Unless the ban also applied to judicial campaign committees, attorneys could funnel money indirectly into judges' coffers. And a judge would still know which attorneys supported his candidacy by seeing who donated to the committee—thus the judge could still reward those attorneys with case assignments.<sup>250</sup> This loophole might lead one to wonder to what extent a Florida-style ban is more about form rather than substance.<sup>251</sup>

Of course, the solicitation ban could be extended beyond what was considered in *Williams-Yulee* to instead prohibit judges from soliciting practicing attorneys either personally or via their campaign committees. But given that the Roberts Court has otherwise consistently invalidated restrictions on campaign finance<sup>252</sup> and any such regulation would be reviewed under strict scrutiny,<sup>253</sup> it is unclear whether these additional limitations would be constitutional.

Moreover, a ban on solicitations from a campaign committee would not touch *unsolicited* contributions from attorneys. The identity of judicial candidates is common knowledge; as such, an attorney could simply send an unsolicited check directly to a candidate as a campaign

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lawyers or persons likely to come before the court on which the judge serves. *This limitation does not prohibit either a judge or candidate from soliciting funds for appropriate campaign or officeholder expenses as permitted by state law.*

TEX. CODE OF JUD. CONDUCT 4(D)(1) (emphasis added).

250. Some states allow campaign committees to solicit donations but prohibit the committees from divulging the names of donors to candidates. *See, e.g.*, ABA Brief, *supra* note 223, at app. 7A (reporting such an arrangement in Idaho). Of course, a donor attorney could still presumably announce to the judge that she in fact did make such a donation, thereby side-stepping such a rule.

251. *See, e.g.*, Eugene Volokh, *Supreme Court Upholds Ban on Judicial Candidates Soliciting Campaign Contributions — Even Via Mass Mailings*, WASH. POST (Apr. 29, 2015, 2:55 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/29/supreme-court-upholds-ban-on-judicial-candidates-soliciting-campaign-contributions-even-via-mass-mailings> [https://perma.cc/XY4Z-PVAY] (concluding a ban might limit the context of face-to-face personal solicitations, which might be different if conducted by a judicial candidate vis-à-vis a representative of her campaign committee).

252. *See* Richard L. Hasen, *Election Law's Path in the Roberts Court's First Decade: A Sharp Right Turn but with Speed Bumps and Surprising Twists*, 68 STAN. L. REV. 1597, 1604 (2016) (discussing the Roberts Court's moves to deregulate campaign finance); John O. McGinnis, *Neutral Principles and Some Campaign Finance Problems*, 57 WM. & MARY L. REV. 841, 851–95 (2016); *see also* Noah B. Lindell, Comment, *Williams-Yulee and the Anomaly of Campaign Finance Law*, 126 YALE L.J. 1577, 1581–87 (2017).

253. *See supra* note 245 and accompanying text.

donation. Such a donation would comply with state campaign laws so long as it did not exceed rules regulating contribution limits.<sup>254</sup>

These examples all illustrate the practical difficulties of eliminating pay to play in assigned counsel systems. The fundamental problem is that judges and attorneys *want* to transact with one another, even after reforms are enacted. Put differently, attorneys still gain from trade with judges, who can provide them income, and judges still gain from trade with attorneys, who can provide them financial and political support. Thus, these parties have strong incentives to circumvent restrictions on contributions or case assignments.

More importantly, even if pay to play is eliminated, this will not necessarily improve the quality of representation for poor defendants. Many indigent defense attorneys maintain outside dockets with paying clients. Given what this research reveals about the financial motivations of many assigned counsel, it is unrealistic to believe these attorneys would devote as much time and effort to their indigent clients as they would to their paying ones, unless doing so offered reputational or financial gains. Indeed, a recent empirical analysis suggests that court-appointed attorneys in San Antonio, Texas, generally obtain worse outcomes for their indigent clients relative to their paying clients, even after controlling for differences in case characteristics.<sup>255</sup> Hence, the incentive gap will continue to plague indigent defendants so long as assigned counsel have incentives to shirk on the effort they expend on such cases.

## CONCLUSION

“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”<sup>256</sup> Despite this pronouncement by the Supreme Court made in the decade prior to

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254. Another more radical approach would be to eliminate popular election of judges altogether. As of 2015, 39 out of 50 states had some form of judicial election (either partisan, non-partisan or retention elections). See ABA Brief, *supra* note 223, at app. 1A–20A. Eliminating popularly elected judges would eliminate the need for campaign funds and the possibility of pay to play. Still, such an approach would still not eliminate the incentive gap.

255. See generally Amanda Agan, Matthew Freedman & Emily Owens, *Is Your Lawyer a Lemon? Incentives and Selection in the Public Provision of Criminal Defense 2* (Nat'l Bureau of Econ. Rsch., Working Paper No. 24579, 2018), <https://www.nber.org/papers/w24579> [<https://perma.cc/2E2V-EP7F>] (finding that case characteristics and within-attorney differences across cases drive these results); see also *id.* at 3 (“[A]ttorneys resolve their assigned cases 13% faster than their retained cases, consistent with reduced effort.”).

256. Griffin v. Illinois, 351 U.S. 12, 19 (1956) (plurality opinion).

*Gideon*, indigent defendants still face a system in which their interests are regularly brushed aside by those who are supposed to represent them. This phenomenon is caused at least in part by poor design: indigent defense systems often create financial incentives for counsel that are at odds with their client's best interests.

This Article is the first to demonstrate with criminal court data that this incentive gap is empirically linked to trial court campaign contributions. We find that attorneys regularly donate to trial court judges before whom they appear. These contributions often look like entry fees from attorneys who have recently become eligible for indigent defense appointments. Judges, in turn, appoint donor attorneys to over twice as many indigent defense cases as non-donor attorneys, with donors often earning tens or even hundreds of thousands of dollars in revenues. Importantly, our results are not driven by unobservable differences between donors and non-donors: only judges to whom attorneys donated assign those attorneys a disproportionate number of cases.

In addition, the donor attorneys in our sample are, if anything, less successful than non-donor attorneys in achieving charge reductions, dismissals, or acquittals, and in avoiding prison sentences for their clients. This is not caused solely by observable differences in defendant or case characteristics or by unobservable time-invariant differences. We suggest donor attorneys might do worse for their clients simply because they have so many more cases assigned to them.

Moreover, the phenomenon we identify here is likely widespread. Though our data are limited to Harris County—the nation's third most populous county—our qualitative evidence suggests pay to play exists throughout Texas. Pay to play might also affect millions of Americans in other states such as California, Georgia, Maryland, Missouri, North Carolina, and Ohio, among others, that permit attorneys to contribute to the judges who control indigent defense appointments.

The apparent prevalence of pay to play in our criminal courts should be a wake-up call about the state of indigent defense in America and the corrosive influence of money in the judiciary. Our assigned counsel system has failed to align the interests of defense attorneys with those of their clients. Until we eliminate this incentive gap,<sup>257</sup> *Gideon*'s promise will remain out of reach.

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257. A complete analysis of how the incentive gap might be eliminated is unfortunately well beyond the space limitations of the present article. It is, however, something we are exploring in detail in a companion working paper. See Neel U. Sukhatme & Jay Jenkins, *Eliminating the*

## APPENDIX

FIGURE A.1. INDIVIDUAL CASE APPOINTMENT FORM—HARRIS COUNTY

<b>INDIVIDUAL CASE APPOINTMENT</b>		Number of Court Days/Hours	RATE	TOTAL (presumptive max.)	AMOUNT (Judge Completes)
<b>NON-TRIAL</b>	First Degree		\$225/day	*\$1125	
	Second Degree		\$175/day	*\$875	
	✓ Third Degree, SJF, MRP/MAJ	5	\$125/day	*\$625	625.00
<b>TRIAL</b>	First Degree		\$500/day		
	Second Degree		\$400/day		
	Third Degree, SJF, MRP/MAJ		\$300/day		
<b>PRE-TRIAL HEARING WITH TESTIMONY &amp; PSI HEARING</b>			\$350/day		
<b>OUT OF COURT HOURS (Must detail on Out-Of-Court Hours Log.)</b>	First Degree		\$85/hour	\$1,700	
	Second Degree		\$60/hour	\$600	
	Third Degree, SJF, MRP/MAJ		\$40/hour	\$400	
<b>INVESTIGATION</b>	<b>Bills submitted by investigators and experts must document the dates and hours spent on the case and must be sworn to or affirmed to as accurate. Expert expenses paid per county policy.</b>			\$600/case	
<b>EXPERT</b>				\$650/case	
<b>MENTAL HEALTH SUPPLEMENT (Must detail on Out-Of-Court Hours Log.)</b>			\$50/hour	\$250	
<b>BILINGUAL SUPPLEMENT</b>			\$50/day	\$250	
<b>AFTER HOURS SUPP. (Trial/Hearing after 6:00 pm)</b>			\$50/hour		
<b>OTHER</b>					
				TOTAL \$	625.00
*The presumptive maximum number of non-trial settings beyond a term assignment is four.					
List date(s) of all Court Appearances. Attach any Out-of-Court Hours Log. 10-20-14 , 11-20-14 , 12-19-14 , 2-3-15 , 2-17-15					

*Incentive Gap and Pay to Play in the Right to Counsel: Public Defenders, Caseload Limits and Contingent Fees in Criminal Defense* (unpublished manuscript) (on file with Authors). There, we examine possible ways to eliminate the incentive gap, including expanding public defender networks, imposing mandatory caseload limits on defense attorneys, and adopting contingency fee payments in assigned counsel and contract attorney cases. We argue that these reforms would alter attorney and judicial incentives in meaningful ways that would help indigent defendants.

TABLE A1: CASES ASSIGNED / REVENUE EARNED FOR DONORS TO ASSIGNING JUDGE VS. DONORS TO ANOTHER JUDGE

	# Cases: Appointed by Donee Judge			Revenue: From Cases with Donee Judge		
	(1)	(2)	(3)	(4)	(5)	(6)
Donor	29.98*** (4.06)	30.21*** (7.22)	33.82*** (6.62)	17,182*** (2,471)	16,379*** (3,329)	14,155*** (2,667)
Observations	5,186	5,186	5,186	2,569	2,569	2,569
Adj. R-squared	0.02	0.03	0.10	0.03	0.06	0.23
Judge, Atty Ctrl	NO	YES	NO	NO	YES	NO
Judge, Atty FEs	NO	NO	YES	NO	NO	YES

*Notes:* This table presents OLS regressions for all felony cases with indigent defense appointments in Harris County, Texas, from 2004-2018, at the attorney-judge pair level. The sample is limited to attorneys who contributed to at least one judge during the sample period. The outcome variable in cols. (1)-(3) is total cases assigned by a judge to an attorney; in cols. (4)-(6), it is total revenue earned by an attorney across all cases assigned by a judge. "Donor" is a dummy variable for whether an attorney ever donated to a judge. Cols. (2) and (5) include controls for attorney and judge characteristics as specified in the text. Cols. (3) and (6) include both attorney and judge fixed effects. All specifications include a constant variable control. Standard errors are heteroskedastic robust in cols. (1) and (4) and clustered at the judge-level elsewhere. \*\*\* = significant at 1% level.

TABLE A2: CASES ASSIGNED / REVENUE EARNED FOR EACH DOLLAR DONATED TO ASSIGNING JUDGE (LIMITED TO ATTORNEYS WHO DONATED TO SOME JUDGE)

	# Cases: Appointed by Donee Judge			Revenue: From Cases with Donee Judge		
	(1)	(2)	(3)	(4)	(5)	(6)
Total Donated	0.065*** (0.020)	0.068*** (0.020)	0.074*** (0.020)	28.02*** (9.37)	29.48*** (6.83)	28.30*** (5.88)
Observations	5,186	5,186	5,186	2,569	2,569	2,569
Adj. R-squared	0.12	0.13	0.20	0.15	0.17	0.32
Judge, Atty Ctrl	NO	YES	NO	NO	YES	NO
Judge, Atty FEs	NO	NO	YES	NO	NO	YES

*Notes:* This table presents OLS regressions for all felony cases with indigent defense appointments in Harris County, Texas, from 2004-2018, at the attorney-judge pair level. The sample is limited to attorneys who contributed to at least one judge during the sample period. The outcome variable in cols. (1)-(3) is total cases assigned by a judge to an attorney; in cols. (4)-(6), it is total revenue earned by an attorney across all cases assigned by a judge. "Total Donated" is the total dollar amount ever donated from an attorney to a judge. Cols. (2) and (5) include controls for attorney and judge characteristics as specified in the text. Cols. (3) and (6) include both attorney and judge fixed effects. All specifications include a constant variable control. Standard errors are heteroskedastic robust in cols. (1) and (4) and clustered at the judge-level elsewhere. \*\*\* = significant at 1% level.

TABLE A3: CASES ASSIGNED / REVENUE EARNED FOR ATTORNEYS WHO DONATED MULTIPLE TIMES TO AN ASSIGNING JUDGE VS. ATTORNEYS WHO DONATED ZERO OR ONE TIME TO THAT JUDGE

	# Cases: Appointed by Donee Judge			Revenue: From Cases with Donee Judge		
	(1)	(2)	(3)	(4)	(5)	(6)
Multiple Donor	37.66*** (7.97)	35.86*** (13.18)	40.03*** (13.48)	23,979*** (4,591)	20,244*** (5,114)	17,361*** (3,885)
Observations	10,723	10,723	10,723	4,939	4,939	4,939
Adj. R-squared	0.00	0.03	0.28	0.02	0.06	0.39
Judge, Atty Ctrl	NO	YES	NO	NO	YES	NO
Judge, Atty FEs	NO	NO	YES	NO	NO	YES

*Notes:* This table presents OLS regressions for all felony cases with indigent defense appointments in Harris County, Texas, from 2004-2018, at the attorney-judge pair level. The outcome variable in cols. (1)-(3) is total cases assigned by a judge to an attorney; in cols. (4)-(6), it is total revenue earned by an attorney across all cases assigned by a judge. "Multiple Donor" is a dummy variable that =1 if an attorney donated  $\geq 2$  times to a judge; =0 for 0 or 1 donations. Cols. (2) and (5) include controls for attorney and judge characteristics as specified in the text. Cols. (3) and (6) include both attorney and judge fixed effects. All specifications include a constant variable control. Standard errors are heteroskedastic robust in cols. (1) and (4) and clustered at the judge-level elsewhere. \*\*\* = significant at 1% level.

TABLE A4: CASES ASSIGNED / REVENUE EARNED FOR ATTORNEYS WHO DONATED MULTIPLE TIMES TO AN ASSIGNING JUDGE VS. ALL OTHER DONOR ATTORNEYS

	# Cases: Appointed by Donee Judge			Revenue: From Cases with Donee Judge		
	(1)	(2)	(3)	(4)	(5)	(6)
Multiple Donor	36.92*** (7.98)	37.29** (14.10)	40.72*** (12.75)	23,154*** (4,611)	21,631*** (4,989)	17,497*** (3,687)
Observations	5,186	5,186	5,186	2,569	2,569	2,569
Adj. R-squared	0.01	0.03	0.09	0.03	0.06	0.23
Judge, Atty Ctrl	NO	YES	NO	NO	YES	NO
Judge, Atty FEs	NO	NO	YES	NO	NO	YES

*Notes:* This table presents ordinary least squares regressions for all felony cases with indigent defense appointments in Harris County, Texas, from 2004-2018, at the attorney-judge pair level. The sample is limited to attorneys who contributed to at least one judge during the sample period. The outcome variable in cols. (1)-(3) is total cases assigned by a judge to an attorney; in cols. (4)-(6), it is total revenue earned by an attorney across all cases assigned by a judge. "Multiple Donor" is a dummy variable that =1 if an attorney donated multiple times to a judge; =0 for 0 or 1 donations. Cols. (2) and (5) include controls for attorney and judge characteristics as specified in the text. Cols. (3) and (6) include both attorney and judge fixed effects. All specifications include a constant variable control. Standard errors are heteroskedastic robust in cols. (1) and (4) and clustered at the judge-level elsewhere. \*\*\* = significant at 1% level.